

JUSTICE OF THE PEACE REPORTS

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KING'S BENCH DIVISION

(LORD GODDARD, C.J., HILBERY AND PILCHER, JJ.)

Oct. 11, Nov. 2, 1951

REX v. FOLKESTONE AND AREA RENT TRIBUNAL. *Ex parte* SHARKEY

Rent control—Rent tribunal—Jurisdiction—Application for grant of security of tenure—Notice to quit served before reference to tribunal—Furnished Houses (Rent Control) Act, 1946 (9 and 10 Geo. 6, c. 34), s. 5—Landlord and Tenant (Rent Control) Act, 1949 (12 and 13 Geo. 6, c. 40), s. 11 (1).

On May 4, 1951, the landlords gave to the applicant, who was a weekly tenant of two furnished rooms, notice to quit expiring on May 13. On May 10 the tenant applied to the rent tribunal for a reduction of his rent and for an extension of the period within which the notice to quit should not take effect. The tribunal reduced the rent, but refused to entertain the second application. On a motion by the tenant for an order of *mandamus*.

HELD: that, reading s. 5 of the Furnished Houses (Rent Control) Act, 1946, and s. 11 (1) of the Landlord and Tenant (Rent Control) Act, 1949, together (as s. 11 (5) of the latter Act required that they should be read), s. 11 (1) of the Act of 1949 was intended, not to give the tribunal a new power, but only to extend the power given to it by s. 5 of the Act of 1946, and, therefore, s. 11 (1) did not give the tribunal power to grant security of tenure where the notice to quit had been served before the reference to the tribunal. The tribunal had, therefore, rightly refused to entertain the application for security of tenure.

Francis Jackson Developments, Ltd. v. Hall (115 J.P. 384), distinguished.

MOTION for order of *mandamus*.

The applicant, one Thomas Sharkey, was at all material times the weekly tenant of two furnished rooms at No. 67, Rancorn Road, Margate. On May 4, 1951, the landlords served on him a notice to quit on May 13. On May 10, the notice not having expired, the applicant referred his contract of tenancy to the Folkestone and Area Rent Tribunal under s. 2 of the Furnished Houses (Rent Control) Act, 1946, seeking a reduction of rent. On the same day he also applied to the same tribunal for an extension of the period within which a notice to quit should not take effect. He purported to make that application under s. 11 (1) of the Landlord and Tenant (Rent Control) Act, 1949. Both applications were heard by the rent tribunal on June 5. They reduced the rent from 30s. to 15s. a week, but refused to entertain the application for an extension of the period within which the notice to quit should not take effect. The applicant then obtained leave to apply for an order of *mandamus* directing the tribunal to hear and determine his second application.

D. G. A. Lowe for the applicant.

J. P. Ashworth for the tribunal.

Cur. adv. vult.

Nov. 2. LORD GODDARD, C.J.: At all material times the applicant was the lessee on a weekly tenancy of two furnished rooms at No. 67, Rancorn Road, Margate. On May 4, 1951, he was served by the lessors with a notice to quit

on May 13 or on such other date seven days after the service of the notice on which his tenancy could lawfully be determined. On May 10, that is to say, after he had been served with the notice to quit, but before the period fixed by the notice had expired, he referred his contract of tenancy under s. 2 of the Furnished Houses (Rent Control) Act, 1946, to the Folkestone and Area Rent Tribunal with a view to getting his rent reduced. On the same day he also applied to the same tribunal for an extension of the period within which the notice to quit should not have effect. He purported to make this application under s. 11 (1) of the Landlord and Tenant (Rent Control) Act, 1949. Both applications were heard by the tribunal on June 5. The applicant was successful in getting his rent reduced from 30s. to 15s. per week, but the tribunal refused to deal with his application for an extension of the period within which the notice to quit served on him should not have effect, holding that the provisions of s. 11 of the Act of 1949 did not apply to the case. It is in respect of the refusal of the tribunal to deal with this second matter that the applicant moves this court to grant an order of *mandamus*.

Section 11 (1) of the Act of 1949 is in the following terms:

"Where a contract to which the Act of 1946 applies has been referred to a tribunal under that Act, and the reference has not been withdrawn, the lessee may, at any time when a notice to quit has been served and the period at the end of which the notice takes effect (whether by virtue of the contract, of the Act of 1946 or of this section) has not expired, apply to the tribunal for the extension of that period: Provided that an application shall not be made under this section where the tribunal have directed, under para. (a) of the proviso to s. 5 of the Act of 1946, that a shorter period shall be substituted for the period of three months specified in that section as the period before the end of which a notice to quit shall not have effect."

Sub-section (5) provides that

"This section shall be construed as one with the Act of 1946 . . . " and it will be observed that the marginal note to the section is "Power of tribunal under Act of 1946 to extend security of tenure." The marginal note to s. 5 of the Furnished Houses (Rent Control) Act, 1946, is "Provision as to notice to quit served after reference to tribunal." That section provides:

"If, after a contract to which this Act applies has been referred to a tribunal by the lessee or by the local authority (either originally or for re-consideration), a notice to quit the premises to which the contract relates is served by the lessor on the lessee at any time before the decision of the tribunal is given or within three months thereafter, the notice shall not take effect before the expiration of the said three months: Provided that—(a) the tribunal may, if they think fit, direct that a shorter period shall be substituted for the said three months in the application of this section to the contract that is the subject of the reference; and (b) if the reference is withdrawn, the period during which the notice is not to take effect shall end on the expiration of seven days from the withdrawal of the reference."

It appears to be reasonably clear that the object of s. 5 in the Act of 1946 is to deal with the case where the landlord, by way of retaliation for his tenant having taken his case to the tribunal, serves him with a notice to quit. The Act provides that, if a notice to quit is served after a reference, whether before or after the decision of the tribunal, the notice shall not take effect before the expiration of three months unless the tribunal thinks fit to substitute a shorter period than three months. Under the Act of 1946 the maximum security that

the tenant could get was three months, and by the clear words of the section only where the notice to quit was served after the reference. In my opinion, s. 11 (1) of the Landlord and Tenant (Rent Control) Act, 1949, was intended to give the tribunal power to extend that period of three months, but, reading the two sections together, I think that that power can only be exercised where the notice to quit was served after the reference to the tribunal. I think the opening words of s. 11 (1).

"Where a contract to which the Act of 1946 applies has been referred to a tribunal under that Act . . ."

mean no more than where the situation has arisen to which s. 5 of the Act of 1946 applies. It is intended, not to give a new power to a tribunal, but only to extend the power already given by the Act of 1946. In my opinion, therefore, the tribunal came to a right decision and the application for an order of *mandamus* must be refused.

HILBERY, J.: The question which has to be answered is whether, on a proper construction of s. 11 of the Act of 1949, the tribunal was right in holding that that section did not give it power to hear an application by the tenant to extend the period at the end of which a notice to quit would expire, where the notice to quit which was the subject of that application had been served by the landlord on the tenant before the tenant referred his tenancy to the tribunal. It was argued for the applicant that the words in s. 11 (1),

"the lessee may, at any time when a notice to quit has been served and the period at the end of which the notice takes effect (whether by virtue of the contract, of the Act of 1946 or of this section) has not expired"

were wide enough to include a case where the notice to quit in question had been served, as in the present case, before the reference of the tenancy to the tribunal. It was said that, if Parliament had otherwise intended, it would be expected that the language of the opening words would be the same as the plain words used in s. 5 of the Furnished Houses (Rent Control) Act, 1946, the section which originated the statutory extension of the contractual period of a notice to quit. By s. 11 (5) of the Act of 1949 it is expressly enacted:

"This section shall be construed as one with the Act of 1946, and references in this section to that Act shall be construed as references to that Act as extended by s. 6 of this Act."

The canon of construction where two Acts are to be read together was stated by the EARL OF SELBORNE, L.C., in *International Bridge Co. v. Canada Southern Ry. Co.* *Canada Southern Ry. Co. v. International Bridge Co.* (1), in the passage of his speech where, referring to two Acts there in question, he said:

"It is to be observed that those two Acts are to be read together by the express provision of the seventh and concluding section of the amending Act; and therefore we must construe every part of each of them as if it had been contained in one Act, unless there is some manifest discrepancy, making it necessary to hold that the later Act has to some extent modified something found in the earlier Act."

That canon of construction was applied to the Weights and Measures Acts of 1878 and 1926 in *Hart v. Hudson Brothers, Ltd.* (2) and in *Phillips v. Parnaby* (3). It is the canon applicable in this case.

(1) (1883), 8 App. Cas. 723, 727.

(2) 92 J.P. 170; [1928] 2 K.B. 629.

(3) 98 J.P. 383; [1934] 2 K.B. 299.

Applying it, and, therefore, reading s. 11 of the Act of 1949 and s. 5 of the Act of 1946 as if they were in one Act, it becomes reasonably clear that s. 11 (1) is not intended to create a power, but is only extending a power which a tribunal would have when acting under s. 5 of the Act of 1946. In other words, where, after a reference to the tribunal under the earlier Act, the lessor had given the lessee a notice to quit before the decision of the tribunal was given or within three months thereafter and the notice to quit was, therefore, not to take effect before the expiration of those three months, the tribunal under the earlier Act could not alter that period except by shortening it, but in future such a tribunal in those circumstances by s. 11 (1) was given power to extend the period. That this is the right construction is, I think, shown by the wording of the whole of s. 11 (1). In the first place, the opening words

"Where a contract to which the Act of 1946 applies has been referred . . ."

suggest that what is thereafter being provided is to follow after a contract has been referred. In the next place, the new power which is given to the lessee by the words which follow expressly deal (*inter alia*) with a situation which could only exist under and by virtue of s. 5 of the Act of 1946 and because that section is continuing in force and of full effect. The section continues:

" . . . the lessee may, at any time when a notice to quit has been served and the period at the end of which the notice takes effect (whether by virtue of the contract, of the Act of 1946 or of this section) has not expired, apply to the tribunal for the extension of that period."

Three situations are there being covered by the new section. The security given by the old Act ended three months after the decision unless the tribunal had shortened that period. After the three months the extension ended, the landlord could give a contractual notice to quit, and the tribunal had no power to extend the period given by the contractual notice. Section 11 (1), therefore, begins by giving the tribunal acting in a reference pending before it under the provisions of s. 5 of the Act of 1946 power to extend the period given by the contractual notice to quit. Next, it gives to such a tribunal so acting power to extend the statutory three months given to the tenant who had referred his tenancy to the tribunal under the Act of 1946, so as to protect him from a notice to quit at the end of three months, but leaves alone the old power which the tribunal already had to shorten the statutory extension. Lastly, such a tribunal is given power to give more than one extension. There is no manifest discrepancy between s. 11 (1) of the Act of 1949 thus construed and s. 5 of the Act of 1946. Indeed, everything in s. 11 (1) thus construed only furthers the purpose of the section of the earlier Act, which was to give protection to a tenant who had referred his tenancy contract to a tribunal against a landlord using his contractual power in retaliation to get rid of such a tenant.

The further powers given by s. 11 (1) enable the tribunal to extend the period given by a notice to quit served after a tenant's reference to the tribunal if he applies at any time during the currency of such a notice, even after the decision of the tribunal on the reference as to rent has been given. Reliance was placed on a statement made in the course of the judgment in the Court of Appeal given by DENNING, L.J., in *Francis Jackson Developments, Ltd. v. Hall* (1) that the application made to the rent tribunal in that case was effective. The Court of Appeal was only considering whether the objection made to the application was an objection which rendered the application ineffective and the court was holding it did not. The point which we are deciding was not before or decided by

(1) 115 J.P. 384, 387; [1951] 2 All E.R. 74, 78; [1951] 2 K.B. 488, 494.

the court in that case. In my opinion, in the case before us the tribunal rightly decided that it had no power to hear the applicant's application and this motion for an order of *mandamus* should be dismissed.

PILCHER, J.: We were told by counsel that a number of conflicting decisions had already been given by rent tribunals throughout the country on the precise point which we have had to consider in this case. This is not surprising, because, speaking for myself, I have felt the greatest difficulty in making up my mind as to the proper meaning to be attached to s. 11 (1) of the Landlord and Tenant (Rent Control) Act, 1949.

There is, in my view, a great deal to be said for the argument that the sub-section, which has to be read in conjunction with s. 5 of the Furnished Houses (Rent Control) Act, 1946, was intended not only to extend the automatic security conferred by s. 5 of the Act of 1946 on lessees served with a notice to quit after they had made a reference, but also to extend security of tenure to lessees who make a reference after receiving notice to quit, provided that they make application during the currency of the notice to quit as provided by the sub-section. The words in the sub-section which provide for the time at which the notice shall take effect, namely, "whether by virtue of the contract, of the Act of 1946 or of this section" do not, in my view, assist the argument of either side. The wording of the marginal note to s. 11 would, in my view, apply equally well whether the section is given wider or more limited application. I was impressed by the argument advanced on behalf of the applicant that, if it had been intended to restrict the application of the section to cases in which the lessee already had an automatic, but limited, security of tenure under s. 5 of the Act of 1946, nothing would have been easier than to say so, as was done in that Act. I was also impressed with the fact that the sub-section provides that the lessee may "at any time when a notice to quit has been served" and not expired, make application to the tribunal. The words "at any time" are of the most general character, and would, if read literally, be wide enough to cover a case in which the service of notice to quit preceded the date of the reference.

Feeling, as I did, that the wording of s. 11 (1) was, to say the least, ambiguous, I did not feel that it was proper to dismiss entirely from consideration the case of *Francis Jackson Developments, Ltd. v. Hall* (1), to which we were referred by counsel for the applicant. In that case the Court of Appeal were considering an appeal by landlords which involved, among other matters, determination of the point whether an application by a tenant under s. 11 (1) of the Act of 1949 for security of tenure was a nullity. The facts of the case disclosed that the notice to quit had been given before the tenant made a reference for reduction of rent under the Act of 1946. On behalf of the landlord it was argued that the application was a nullity on the ground that it was bad in point of form. This argument was rejected. The point was not, however, taken that the tribunal had no right to entertain an application under s. 11 (1) by a lessee who had received notice to quit before he made his reference. Giving the judgment of the court, DENNING, L.J., said:

"The application of Sergeant Perkins on Dec. 7, 1950, was, in our opinion, an effective application under s. 11 of the Act of 1949, and gave him security of tenure until the application was heard or withdrawn."

While I recognise that the question as to the right of a lessee to make an application under s. 11 (1) of the Act of 1949 when his reference to a rent tribunal has been made after receiving notice to quit does not appear to have been argued

(1) 115 J.P. 384, 387; [1951] 2 All E.R. 74, 78; [1951] 2 K.B. 488, 494.

in this case, I feel bound to pay some attention to the fact that the Court of Appeal did not itself take this point and appears to have assumed that such an application by a tenant was effective. But though the considerations to which I have referred have weighed with me, I respectfully agree with the judgments already delivered, that there is very considerable force in the view that the opening words of s. 11 (1) were intended to govern the whole section and to restrict its application to cases already covered by s. 5 of the Act of 1946. In my view, the meaning of s. 11 (1) is by no means clear. If I had been called on to construe it by myself, I should, I think, have felt some hesitation in accepting the argument for the respondents. In view, however, of the ambiguity of the wording of the section and the doubts which I have felt I do not feel justified in differing from the clear and decided views expressed by LORD GODDARD, C.J., and HILBERY, J.

Application refused.

Solicitors: *Jaques & Co.*, agents for *Malcolm Borg & Borg*, Margate (for the applicant); *Solicitor, Ministry of Health* (for the tribunal).

T.R.F.B.

PROBATE, DIVORCE AND ADMIRALTY DIVISION

(LORD MERRIMAN, P., AND COLLINGWOOD, J.)

Oct. 30, 1951

KASHICH v. KASHICH

Husband and Wife—Maintenance—Respondent husband a foreigner—Need to ensure his understanding charges and evidence.

Where a foreigner, who is ignorant of the English language or has little knowledge of it, is before a court of summary jurisdiction as respondent to a summons taken out by his wife for maintenance on the ground of his persistent cruelty and desertion the justices must see that all the necessary steps are taken to make him understand exactly what the charges are which are made against him and the evidence which is given in support of them.

Re v. Lee Kun (1915) (80 J.P. 166), applied.

APPEAL by the husband from an order of Rotherham justices, made on the ground of his persistent cruelty and desertion, that he should pay £2 a week for the maintenance of his wife and £1 a week for that of his child.

J. E. N. Russell for the husband.

The wife did not appear.

LORD MERRIMAN, P.: This is a husband's appeal from an order made by Rotherham justices on Sept. 3, 1951, in favour of the wife on the grounds of his persistent cruelty and desertion. On a finding that both these offences had been proved, the husband was ordered to pay £2 a week for the wife and £1 a week in respect of the child of the marriage. He has appealed to this court because he says he did not understand what was going on. He is a Yugoslav. He was not represented, and there was no interpreter. He asserts, in effect, that he was completely taken by surprise, and in an affidavit which has been put before us today he says that it was not until the case was over and he was told by his wife's solicitor that there was an order against him under which he would be bound to pay or he might be sent to prison, that he understood that what was going on was not some form of reconciliation procedure.

I wish to say as little about this case as possible in the way of controversy. I give the magistrates and their clerk and the wife's solicitor full credit for thinking, as, judging from their affidavits, they obviously do think, that the husband understood a great deal more of what was going on than his affidavit which was read in this court would suggest. I must not be taken to be impugning the good faith of those who have sworn these affidavits in any way, but, in my opinion, while it is most important to uphold the authority of those who are entrusted by Act of Parliament with the decision of these matters, it is equally important, in well-known words, to ensure not merely that justice is done but that it is manifestly seen to be done, and I have come to the conclusion that it would not be satisfactory to allow this decision to stand, in spite of the very strong affidavits which have been filed by the justices. I will endeavour to show why I think that is the inevitable conclusion.

First of all, it is important to bear in mind that there are two charges of which this man has been convicted. He has been convicted of persistent cruelty. He has also been convicted of desertion. It is one of those cases in which the desertion is of what we are accustomed to call the constructive kind, that is to say, the wife left the matrimonial home because she was, so to speak, expelled from it by the husband's conduct. To a foreigner who is unacquainted with our law and understands imperfectly what is going on, it may require a certain amount of explanation that a wife who has left him is able to charge him with deserting her. If there is one thing that is quite certain on the face of all the affidavits that we have before us, it is that from beginning to end the nature of the charge of desertion has never been explained to the appellant. To my mind that, and that alone, would be enough to prevent this finding from standing. There is not a hint that it was ever explained to this man that the desertion was a corollary of the charge of cruelty—that it was necessary for the wife to prove that she had been expelled from the home by his conduct, but that that inference might be drawn from the very nature of that conduct, which was being put forward to support the charge of cruelty.

There is something much more important even than that. In quoting the passage which I am about to quote from the judgment of LORD READING, C.J., in *Rex v. Lee Kun* (1), let it be plainly understood that I am not suggesting that matrimonial offences are to be treated literally as if they were criminal charges. Nevertheless, when one is talking about the natural justice of proceedings, and, incidentally, the fact that status is involved, there obviously may be a common area of a considerable extent, particularly with regard to the necessity of being sure that the parties understand what is going on. With regard to a criminal case LORD READING made some observations dealing with what he called the abstract question and it is plain that he intended his words to be of wide import. He said:

"When a foreigner who is ignorant of the English language is on trial on an indictment for a criminal offence, and is undefended, the evidence given at the trial must be translated to him . . . If he does not understand the English language he cannot waive compliance with the rule that the evidence must be translated. He cannot dispense with it by expressed or implied consent, and it matters not that no application is made by him for the assistance of an interpreter. It is for the court to see that the necessary means are adopted to convey the evidence to his intelligence, notwithstanding that, either through ignorance or timidity or disregard of his own interests, he makes no application to the court. The reason is that the trial

(1) 80 J.P. 166; [1916] 1 K.B. 337.

of a person for a criminal offence is not a contest of private interests in which the rights of parties can be waived at pleasure. The prosecution of criminals and the administration of criminal law are matters which concern the State. Every citizen has an interest in seeing that persons are not convicted of crime, and do not forfeit life or liberty, except when tried under the safeguards so carefully provided by the law."

A great deal of that, of course, does not strictly apply to the present case, but, nevertheless, it has been laid down over and over again that the State is interested as, so to speak, the invisible third party, in all matrimonial disputes, and I would point out that one result of this case is that either on the ground of cruelty after the lapse of three years from the marriage, which took place on Mar. 8, 1951, or on the finding of desertion after the lapse of three years from the date of the parting which was on or about Aug. 29, if nothing intervenes in the meanwhile, the wife can present a petition for divorce and support her case by the fact that this finding has been made in her favour both in respect of persistent cruelty and in respect of desertion.

I do not think it is necessary to justify the application to this case of such a sentence as that which I have quoted:

"It is for the court to see that the necessary means are adopted to convey the evidence to his intelligence, notwithstanding that, either through ignorance or timidity or disregard of his own interests, he makes no application to the court."

That seems to me to be applicable to any case in which status is involved, if not to almost every conceivable type of case. At any rate, I am prepared to lay it down that it is applicable to such a case as this. Let us see how the matter stands with regard to that. Two of the justices, their clerk, and the wife's solicitor, have all said that at a certain stage in the case—after the wife had completed her evidence—the husband was told what his rights were and that he made a long and voluble statement. They all fasten on two points which they understood him to be making, namely, that he had paid his wife money and that he complained of the fact that she was always out late at night or was too much with her mother. The wife was the only witness. Her evidence was entirely uncorroborated, in spite of the fact that she mentioned the police in one connection and there was manifestly a landlady whose evidence might or might not have been of some assistance, but it depended upon her statement, made during the vital period when she was giving her evidence, according to the affidavit of the clerk to the justices, and her statement only, that the husband understood English if he chose to do so. That is the only precaution, so far as I can see from the evidence which is now laid before us, during the vital period when she was telling her story of this very brief married life, which the court took to assure itself that the husband understood what she was saying. That does not satisfy me that justice has not only been done, but has manifestly been seen to be done.

I express no opinion on the merits. It is an unfortunate circumstance that the wife, in spite of the adjournment, is not here to support her order. She knows that this order is being challenged on the ground that it was made against a husband who did not really understand what was going on. She has not come to support it. I do not make any point against her for that, but it is unfortunate from our point of view that we have not heard any representations on her part. But, dealing with the matter as best one can on general principles, I am not satisfied that during the giving of her evidence the husband fully understood what was going on, and I am not satisfied that he ever had the nature of one of

the two charges, a charge which was found against him, fully explained to him at all. In these circumstances and having regard to the very strong evidence about what his linguistic capacity really is, I think it would be wrong, whatever the merits of the matter may be, to allow this order to stand. In my opinion, it must be set aside, and the case must be tried afresh by a new panel of the justices for the county borough of Rotherham. I need scarcely say that I hope it will be tried *de novo* in the full sense of the word, and on this occasion I hope the husband will be properly represented and that there will be an interpreter.

COLLINGWOOD, J.: I agree. The husband is a foreigner. He claims to have but a scanty knowledge of the English language, and there is considerable evidence before us which supports that. He says that he was under a complete misapprehension as to what was going on when he was before the justices. He was not represented, and he says that he thought he was going through some process directed towards effecting a reconciliation between himself and his wife. That being so and he being under this misapprehension, when he was asked by the clerk to the justices questions to enable the clerk himself to perform the process of cross-examination which would have been done by his representative, had he had one, he did not put before the clerk the proper material. I think it may well be that the justices were misled into thinking that he understood far more than he actually did understand. The only material which they had to lead them to think that he understood the character of the proceedings was the fact that the wife said that he could understand if he wanted to. Further, as the **PRESIDENT** has pointed out, there are two charges here, desertion and persistent cruelty. Did he understand what the charge of constructive desertion involved? There is nothing whatever in the material before us to suggest that any effort was made to enlighten him on that, perhaps, somewhat obscure, subject. For these reasons I agree that this appeal must be allowed.

Appeal allowed.

Solicitors: *Biddle, Thorne, Welsford & Barnes* (for the husband).

G.F.L.B.

CHANCERY DIVISION

(HARMAN, J.)

Oct. 25, 26, Nov. 14, 1951

Re 42-48 PADDINGTON STREET AND 62-72 CHILTERN STREET,
ST. MARYLEBONE. MARKS & SPENCER, LTD. *v.* LONDON COUNTY
COUNCIL AND ANOTHER

Town and Country Planning—Unfinished buildings—“Works for the erection of a building”—Completion of clearance of site—Erection of new building not begun—Separate contracts for clearance and building—Town and Country Planning Act, 1947 (10 and 11 Geo. 6, c. 51), s. 78 (1).

In August, 1937, the plaintiffs entered into a building agreement with P.E., under which, on the completion of agreed buildings on a certain site, the plaintiffs would become entitled to a lease of the premises for ninety years at an agreed rent. It was provided that the demolition of the existing buildings on the site must be started by mid-summer, 1938, and that the erection of the new buildings be completed by Christmas, 1939. The time limits, were, however, in fact extended beyond the date of these proceedings. By August, 1938, all consents to the building

scheme under the London Building Act, 1930, the Restriction of Ribbon Development Act, 1935, and the Town and Country Planning (General Interim Development) Order, 1933, had been obtained. Plans for the new buildings were approved, and on June 9, 1939, the plaintiffs entered into a written contract with contractors for the demolition of the existing buildings, which was completed by Aug. 2, 1939. At that time war with Germany was regarded as imminent and no contract for the new building was entered into, and during the war the building project remained in abeyance. Execution of the scheme was resumed in November, 1948, when the plaintiffs gave notice to the London County Council of their intention to proceed. The council refused to sanction the development of the site, and the Central Land Board refused the plaintiffs' claim to exemption from development charge. The plaintiffs claimed that planning permission must be deemed to be granted to them by virtue of the Town and Country Planning Act, 1947, s. 78 (1).

HELD: where a contract had been entered into for both the demolition of existing buildings and the erection of new ones, that might be sufficient to constitute "works for the erection . . . of a building" within s. 78 (1) although only the demolition work had been carried out, but where, as in the present case, the demolition contract stood alone, the work of demolition had been finished, and no contract for the erection of a new building had been entered into before the appointed day, no "works for the erection of a building" had been "begun but not completed" before that day.

Town and Country Planning—Interim development—Conditional permission—Limitation of time for commencement and completion of work—No reason given for imposing condition—Validity of condition—Town and Country Planning Act, 1932 (22 and 23 Geo. 5, c. 48), s. 10 (3).

The permission granted to the plaintiffs under the interim development order was dated Aug. 9, 1938, and was subject to a number of conditions of which the first was that the work should be commenced within six months and completed within eighteen months of Aug. 1, 1938, "failing which the consent shall become null and void."

HELD: the condition relating to time was a condition within the contemplation of the Town and Country Planning Act, 1932, s. 10 (3), and, therefore, was not *ultra vires*; it was not necessary under that sub-section that the council should state their reasons for imposing conditions in granting the permission sought; and, therefore, even if the plaintiffs had begun the erection of a building before the appointed day (July 1, 1948), within s. 78 (1) of the Act of 1947, the works could not immediately before that day "have been completed . . . in accordance with permission granted" within the sub-section.

ADJOURNED SUMMONS to determine, *inter alia*, whether, on the true construction of the Town and Country Planning Act, 1947, s. 78, the plaintiffs had not before the appointed day (July 1, 1948) begun, but not completed, works for the erection of a building on a certain site, and (ii) whether, on the true construction of the Town and Country Planning Act, 1932, s. 10 (3), and the Town and Country Planning (General Interim Development) Order, 1933, the plaintiffs had immediately before the appointed day had valid permission to complete the said works.

Rowe, K.C., J. R. Willis and V. M. C. Pennington for the plaintiffs.

Russell, K.C., and H. E. Francis for the first defendant, the London County Council.

Denys B. Buckley for the second defendant, the Central Land Board.

Cur. adv. vult.

Nov. 14. **HARMAN, J.**, read the following judgment. To succeed in this application the plaintiffs must satisfy the conditions imposed by the Town and Country Planning Act, 1947, s. 78 (1), which, so far as here relevant, is in the following terms:

" . . . where any works for the erection . . . of a building have been begun but not completed before the appointed day, then if immediately

before that day those works could have been completed . . . in accordance with permission granted . . . under an interim development order . . . planning permission shall, by virtue of this section, be deemed to be granted under Part III of this Act in respect of the completion of those works."

The site concerned is a considerable one, fronting on East Street and Paddington Street, Marylebone, and forming part of the Portman estate. If the "works" of the plaintiffs on that site satisfied the conditions of the section, then they are entitled to complete those works without the permission (which has been refused) of the first defendant, the London County Council, and without paying a development charge to the second defendant, the Central Land Board.

The relevant facts are not seriously in dispute. They begin with a building agreement entered into in August, 1937, by the plaintiffs with a representative of the Portman estate. Under this agreement the plaintiffs would become entitled, on the completion of the agreed buildings on the site, to a lease for ninety years at a rent rising to £840 a year. The agreement provided for a forfeiture if the intended lessee should fail to proceed with or complete the works in accordance with the agreement, by sched. III to which the demolition of the old buildings must be begun by mid-summer, 1938, and the erection of the new ones completed by Christmas, 1939. These time limits have been extended beyond the present date. At the time this agreement was made, there was a number of buildings standing on the site held under leases which would all expire in March, 1938. The rents of these properties amounted in the aggregate to about £500 a year. In April, 1938, the plaintiffs' architects completed a written specification for the demolition of the old buildings. In June, 1938, the plaintiffs obtained vacant possession of the last occupied portion of the old buildings and by August, 1938, they had obtained all the consents necessary to their re-building scheme under the London Building Act, 1930, the Restriction of Ribbon Development Act, 1935, and the Town and Country Planning (General Interim Development) Order, 1933 (S.R. & O., 1933, No. 236). About the same time the Portman estate approved the re-building plans which were for administrative offices connected with the plaintiffs' business, and all was ready to go forward. The plaintiffs' architects then sent out offers to a number of builders, and tenders were received in October, 1938, which were not considered satisfactory by the plaintiffs on the ground of expense, and they were minded, instead of accepting any of them, to entrust the work to Bovis, Ltd., contractors who had done work for them in the past on what may very roughly be called a "cost-plus" basis. No steps, however, were taken during the autumn or winter of that year (1938-39) and in March, 1939, some pressure was forthcoming from the Portman estate on the footing that the new buildings were due for completion at Christmas of that year. Stirred to action by this, the plaintiffs decided to proceed with the demolition of the old buildings, and on June 9, 1939, entered into a written contract with demolition contractors for this purpose. Under this document, the plaintiffs had to pay (as they did) £595 and the contractors had to complete the demolition (as they did) by Aug. 2, 1939. There was included in the work of demolition the clearance of the cellars under the old buildings, part of which were intended to be used in connection with the new buildings to be erected, although further excavation would have been necessary.

Mr. Lees, estate manager of the plaintiffs, who was cross-examined before me, stated that when the plaintiffs entered into this contract they intended to proceed, after the demolition was completed, with their re-building scheme. This evidence I accept. Indeed, the conclusion seems obvious, for persons in the plaintiffs' position, who are paying some £800 a year in rent, do not demolish

buildings which might reasonably be expected to let for a considerable part at any rate of that sum unless they intend to replace them by other buildings more to their purpose. The plaintiffs admit that no contract was ever entered into with Bovis, Ltd., and no instructions were given to that or any other firm to begin the new buildings. In fact, by the time the demolition was complete, no one was thinking much of new buildings. War was imminent and, even before the demolition was complete, application on behalf of the fire fighting services then being trained to use this site had been made. This permission was granted, and the re-building project was for the time set aside, and, of course, remained in abeyance during the war and for some time thereafter. That it was never abandoned is common ground. It was not actively taken up again until November, 1948, when the plaintiffs sent written notice to the defendant council of their intention to proceed with what was described in their letter as "the completion of the building work authorised by your council under the Town and Country Planning Act, 1932, and the Town and Country Planning (General Interim Development) Order, 1933." In May, 1949, the defendant council, purporting to act under the Act of 1947, refused to sanction what was described as the development of the site. Thereafter, there was an application to the second defendant for exemption from development charge, which was refused, and the present application is the outcome.

To succeed the plaintiffs must satisfy two conditions: (i) that works for the erection of a building had been begun but not completed before the appointed day, *i.e.*, July 1, 1948; (ii) that immediately before that day those works could have been completed in accordance with permission granted under an interim development order. The plaintiffs aver that they have satisfied both these conditions. The defendants deny it. I will discuss these questions in the order stated.

As to the first question, counsel for the plaintiffs argued that the whole purpose of the purchase of the site was to re-build on it; that the approved plan for this was deferred, but never abandoned; that the object of the demolition carried out was the first step towards the new building; that there was no need to have begun re-building or to have a building contract, but that the condition was satisfied if there were works of a physical nature done on the site for the purpose of erecting buildings; that the demolition done satisfied the condition because, being carried out for the purpose of re-building, it must be part of it, and that what was begun, but not completed, before the appointed day was the entire plan for demolition and re-building. He called in aid s. 12 (2) of the Act of 1947 to show that this demolition, being part of a re-building scheme, would require permission under the Act as being a development of the land because it was

"the carrying out of building . . . or other operations in, on, over or under land . . .",

demolition being (he argued) an "other operation" when considered in connection with re-building. He also referred to s. 80 of the Act by way of contrast and to show how the Act deals with a case where, though permission might have been granted for a change of user before the appointed day, no work had actually been begun. Counsel for the defendant council argued that the work done was mere demolition—done, no doubt, with the ultimate purpose of re-building—but that construction was no part of what was done. He argued that s. 78 deals with works which require planning permission under the earlier Acts and that demolition was not such a work, there being nothing in the Act of 1932 about demolition requiring any permission except in s. 17, which deals with historic buildings. He argued further that the work of demolition, which was the only

work done, was not unfinished at the critical date and that it was impossible to go on the site on that date and point at any works as being unfinished works.

I propose to walk warily among the intricacies of this puzzling legislation and to decide no more than I need. In my judgment, it is really a question of fact whether, at the critical date, works for the erection of a building had been begun, but were not finished on the site. It was agreed before me that "works," by reason of the use of the plural, must connote physical operations on the site. It is clear that the erection of a building need not have been begun, because otherwise no meaning would have been given to the words "works for." It seems to me that, if there had been here a building contract which involved the demolition of the old buildings before the erection of the new, it might well have been possible to say that, though the performance of the contract had proceeded no further than the demolition of the old buildings, that was, nevertheless, works for the erection of the new. This is not that case. Here the demolition contract stands alone, the contractors' work was finished, and no further contract ever came into existence. In my judgment, it is not possible to say that the site as it was on the appointed day contained works for the erection of a new building. I am, therefore, of opinion that the plaintiffs fail.

My decision on the first point is sufficient to conclude the case, but it may be desirable that I should express my views on the second point which was fully argued before me. As I have said, the plaintiffs must also show that immediately before July 1, 1948, the works which had been begun could have been completed in accordance with permission granted under an interim development order. I have also shown that by August, 1938, the plaintiffs had obtained all the necessary consents, and were, therefore, in a position at that time to complete the works. The question is whether they remained in that position until July, 1948. This calls for a consideration of the permission granted under the interim development order. This was contained in a document of Aug. 9, 1938, addressed by the council to the plaintiffs' architects. The permission given is made subject to a number of conditions, the first of which is that the work be commenced within six months and completed within eighteen months from Aug. 1, 1938, "failing which the consent shall become null and void." The remaining conditions I need not particularise. It is clear, therefore, that, if this condition be good, the plaintiffs cannot satisfy s. 78 (1) of the Act of 1947 because the permission had become void before the relevant date. The plaintiffs, however, argued that the conditions were void for two reasons—(i) that the condition as to time was *ultra vires* the authority and could be disregarded, and (ii) that the conditions were of no effect because no reasons for them were stated in the document.

The relevant section for this purpose is s. 10 (3) of the Town and Country Planning Act, 1932, which provides:

"Where an application for permission to develop land is made to the specified authority in manner provided by the [General Interim Development Order, 1933], the authority may, subject to the terms of the order, grant the application unconditionally or subject to such conditions as they think proper to impose, or may refuse the application, and they shall be deemed to have granted the application unconditionally unless within two months from the receipt thereof, or within such longer period as the applicant may agree in writing to allow, they give notice to him that they have decided to the contrary, stating their reasons for so doing . . ."

As to the point about time, it was argued that the conditions imposed must relate to development and have nothing to do with time. I cannot accept this

contention. It seems to me that the question of time may be intimately bound up with the question of planning and that it cannot be unreasonable or irrelevant that an authority should fix a time limit to any permission they may grant. If it were otherwise, the authority might be embarrassed by permissions long out of date and inappropriate to changed circumstances. Moreover, in para. 19 of sched. II to the Act of 1932, among the matters to be dealt with by schemes, limitation of time for operations of schemes is mentioned as one element, and it is to be observed that in the Town and Country Planning Act, 1944, s. 46 (1), the grant of permission for a limited period may be made part of any permission granted. For these reasons, I do not accept the first argument. The second argument depends on the words "stating their reasons for so doing." Do these words apply only where permission is refused, or do they apply also where conditions are imposed? In my judgment, the words "to the contrary" mean a decision to the contrary of a grant, in other words, a refusal. It is natural and proper that where the authority refuse to grant permission, they should state their reasons for so doing, in order that the applicant may not be embarrassed in the appeal to the Minister which he may make. Where, however, conditions are imposed on a consent, the applicant is not embarrassed if he desires to appeal against the imposition of the conditions, as he knows what they are. For these reasons, I am of opinion that the permission granted validly imposed the conditions it contained, and that, therefore, the plaintiffs were not free to proceed in 1948 and the provisions of s. 10 (3) of the Act of 1932, by which the authority must be deemed to have granted the application unconditionally, do not apply.

For these reasons, in addition to those stated under the first head, I am of opinion that the plaintiffs fail to make out their case and that the summons should be answered by declaring, in answer to question 1, that on the true construction of s. 78 (1) of the Act of 1947 the plaintiffs had not before the appointed day begun, but not completed, works for the erection of their building, and, in answer to questions 2 and 3, that on the true construction of s. 10 of the Act of 1932 the plaintiffs immediately before the appointed day had not a valid permission to complete the said works nor should they be deemed to have such a permission. I answer question 4 by saying the development charge under Part VII of the Act of 1947 can be lawfully determined by the second defendants and that the plaintiffs will be bound to pay it.

Order accordingly.

Solicitors: *J. C. Parry* (for the plaintiffs); *J. G. Barr* (for the first defendant);
Treasury Solicitor (for the second defendant).

R.D.H.O.

COURT OF APPEAL

(SOMERVELL, JENKINS AND HODSON, L.J.J.)

Nov. 19, 1951

GROVE v. EASTERN GAS BOARD

Gas—Entry of premises for purpose of inspection—Right of forcible entry to collect money from meter—Gas Act, 1948 (11 and 12 Geo. 6, c. 67), sched. III, para. 34 (1).

The plaintiff's premises were supplied with gas for domestic purposes by the defendant gas board, and a pre-payment meter had been installed. An officer authorised by the board and in possession of a duly authenticated document showing his authority called to collect money from the meter, but, having failed after frequent attempts to gain access to the premises, broke a pane of glass near the door, entered the premises, and, on leaving, replaced the glass, thereby making the premises secure. In an action by the plaintiff against the board for trespass,

HELD: the powers of entry conferred on the board by para. 34 (1) of sched. III to the Gas Act, 1948, which should be read in conjunction with para. 36, included, when necessary, a power of forcible entry, and, in the circumstances, the board were not liable in trespass.

APPEAL by the plaintiff from an order of **HILBERY, J.**, dated May 28, 1951, whereby he held that the defendants, the Eastern Gas Board, were not liable in trespass for a forcible entry into the plaintiff's premises to collect money from the gas meter.

For the plaintiff it was contended that the right of forcible entry was confined to entry for the purposes mentioned in para. 35 (1) of sched. III to the Gas Act, 1948, after notice had been given, and did not include entry under para. 34 (1).

Melford Stevenson, K.C., and Pearl for the plaintiff.

Gardiner, K.C., and B. Lewis for the gas board.

SOMERVELL, L.J.: This is an appeal from a decision of **HILBERY, J.** The plaintiff claimed damages for trespass and alleged that

"the defendants, by their servants or agents, wrongfully broke into the [plaintiff's] premises by removing a front window and thereby entered the said premises."

The defendants, the Eastern Gas Board, admitted that they entered the premises, and there is no dispute that they did so by breaking a pane of glass near a door. They admitted that they opened the door and went in. When they left the house they replaced the pane of glass in the proper manner, and the premises were as secure after they left as they were before they entered. Their defence, in substance, was that they were entitled to do what they did under statutory powers contained in the Gas Act, 1948.

The plaintiff lived at 51, Tudor Road, Edmonton, which was a house supplied with gas for domestic purposes. Prior to the setting up of the various gas boards under the Gas Act, 1948, he was supplied by the Tottenham and District Gas Company. He had in his house a meter and a coin box. The procedure with the coin box is one which is familiar. The consumer puts a coin into the box and he then gets a supply of gas. When the amount of gas for which the coin was inserted has been exhausted, the supply ceases and another coin has to be put in. The board wanted to collect the money which had accumulated in the coin box and, I dare say, to inspect the meter and perform other routine duties and the evidence was that they could not get in as there was nobody in the house. On three occasions they put through the letter box printed pre-paid postcards saying that their collector had made a call and failed to gain access and asking

the plaintiff to state on the card a time, giving forty-eight hours' notice, when it would be convenient to him for a servant of the board to obtain admittance. None of those cards was used. The plaintiff admitted that a card dated July 12, 1949, had been received, but he disputed receiving the other cards. The learned judge found as a fact that the other cards were left and that they must have been seen by the plaintiff or his wife or both of them. Although it may not be material to the question of construction which we have to decide, it is right to state that, on the facts as found by the learned judge, considerable time was allowed to elapse and steps were taken to enable the plaintiff to tell the board when it would be convenient for him to let their representative enter the premises. This case turns on whether they were authorised by the statute to enter in the way they did. The learned judge decided that they were and the plaintiff appeals.

Paragraph 34 (1) of sched. III to the Gas Act, 1948, provides:

"Any officer authorised by an area board may at all reasonable times on the production of some duly authenticated document showing his authority, enter any premises in which there is a service pipe connected with the gas mains of the board, in order to inspect the meters, fittings and works for the supply of gas, or for the purpose of ascertaining the quantity of gas consumed or supplied, except in a case where the occupier of the premises has applied in writing to the board for the disconnection of the service pipe from the mains and the board have failed to disconnect it within a reasonable time."

Paragraph 35 provides:

"(1) Where—(a) a person occupying premises supplied with gas by an area board ceases to require such a supply; or (b) a person entering into the occupation of any premises previously supplied with gas by an area board does not take a supply of gas from the board or hire such of the pipes, meters, fittings or apparatus on the premises as belong to the board; or, (c) an area board are authorised to cut off the supply of gas from any premises, it shall be lawful for an officer authorised by the board after twenty-four hours' notice to the occupier under the hand of an officer so authorised, or if the premises are unoccupied to the owner or lessee of the premises, to enter the premises at all reasonable times for the purpose of removing and to remove any pipes, meters, fittings or apparatus, through which the supply was given to the first-mentioned premises. (2) The notice required to be given by the last preceding sub-paragraph may, in the case of unoccupied premises, the owner or lessee of which is unknown to the area board and cannot be ascertained after diligent inquiry, be given by affixing it upon a conspicuous part of the premises not less than forty-eight hours before the premises are entered. (3) Where an area board have reasonable cause to suspect that gas is escaping in any premises, it shall be lawful for an officer authorised by the board to enter the premises for the purpose of inspecting the gas fittings and preventing the escape and to inspect such fittings and carry out any work necessary to prevent such escape."

It was submitted below, although not, I think, pressed in this court, that the words in para. 34 (1), "production of some duly authenticated document showing his authority," indicate that, unless there is somebody on the premises to whom the document can be produced, the powers conferred by the paragraph, whatever they may be, cannot be exercised. There is no dispute here that the representative of the board who made the entry had a duly authenticated document showing his authority, and that a neighbour, seeing this man about to enter the house, made some inquiries and the representative produced his card. I do not accept

the argument as I have stated it, and I agree with the learned judge where he says that para. 34 (1) requires that the entry for the purposes mentioned in that paragraph must be at a reasonable time and that the officer making the entry must, if required, produce a duly authenticated document showing his authority to anyone reasonably requiring him to do so.

The main question here is whether para. 34 (1) authorises a forcible entry. To determine that point of construction it is necessary to read para. 36 and para. 37. Paragraph 36 provides:

"Where, in pursuance of any powers conferred by this schedule, entry is made on any premises by an officer of an area board, the officer shall ensure that the premises are not left less secure by reason of the entry, and the board shall make good or pay compensation for any damage caused by the officer in entering the premises, in carrying out any inspection or work therein or in making the premises secure."

Paragraph 37 provides:

"If any person obstructs any officer exercising powers under either of the three last preceding paragraphs or any other power of entry conferred by this schedule, he shall be liable on summary conviction to a fine not exceeding £5."

Counsel for the plaintiff submitted that a right of entry on to premises is one which, if conferred, requires to be expressed in plain terms. I agree. On the other hand, I think it is right to bear in mind, in any case where the question arises, the subject-matter with which the Act of Parliament which has to be construed is dealing. The Gas Act, 1948, deals with the supply of gas, and, as everybody knows and the terms of the Act show, the supply of gas involves a meter and other apparatus in the house. The meter requires to be read and the apparatus to be inspected from time to time, and there is provision for this common method of supply under which—no doubt, for the convenience of the consumer—he is enabled to pay by putting coins in a box. In that context and having regard to that subject-matter, there would, I think, be no cause for any surprise if one found that those who supply the gas were given power to inspect the meters and to collect the money which is owed to them for gas which has been already supplied.

The learned judge—I think rightly—regarded para. 36 as of great importance. In the context of this paragraph of the schedule, and, perhaps, broadly speaking, a power of entry conferred by a statute is, *prima facie*, a power, if necessary, of forcible entry. There would be no need for statutory authorisation if all that the representatives of the gas board were allowed to do was to enter and read the meter if the consumer was willing to admit them to the place where the meter was. Therefore, *prima facie*, I would have said that para. 34 (1) imposed a power of forcible entry, and that construction is strongly reinforced by para. 36. Paragraph 36 is quite general, and I can see no grounds for confining, as counsel for the plaintiff would seek to do, the word "entry" in it to entry under para. 35. The natural construction is that it covers entries made in pursuance, as it says, "of any powers conferred by this schedule." That it implies a power of forcible entry is plain from its terms, because the officer has to ensure that the premises are not left less secure by reason of his entry. Counsel submits that the learned judge did not have sufficient regard to the fact that the later words in para. 36 refer to making good or paying compensation for damage caused not only in entering the premises

or in making them secure, but also in carrying out any inspection or work therein, and he would seek to confine its operation (so far as para. 34 (1) is concerned) to damage arising out of inspection or work therein. I can see no reason for confining it in that way. I think that, as it refers to entry and clearly contemplates forcible entry in pursuance of any power conferred by the schedule, it reinforces the *prima facie* construction which I have already put on para. 34 (1), viz., that the fact that that paragraph gives a statutory authorisation to enter would lead to the conclusion that it was authorising forcible entry where necessary.

Counsel for the plaintiff also referred to the differences between paras. 34 (1) and 35 (1) and relied on the fact that under para. 35 (1), where the premises are unoccupied, notice has to be given, whereas there is no provision for notice in para. 34 (1), the suggestion being that a right of forcible entry would normally be preceded by some formal notice. Evidence (which was not objected to) was given that para. 34 (1) might well be required in the case where, as, apparently, sometimes happens, the consumer is seeking to divert the gas from going through the meter and thereby to escape payment for it, and it was said by a witness who had a great deal of experience that where the board have reasons for suspecting that that may be happening, if they had to give notice it might defeat the whole object of an inspection, whereas, if they had the right to inspect without notice, they might discover acts of that kind. But, in any event, I cannot think that the provision as to notice enables one to come to the conclusion that forcible entry is excluded from para. 34.

The learned judge came to the conclusion that under the earlier legislation there was clearly a power to make forcible entry, in circumstances such as these, under the statutory predecessor of para. 34. He also referred to s. 17 (1) of the Act of 1948, which provides that

" . . . all property, rights, liabilities and obligations which, immediately before such date as may be appointed by order of the Minister . . . were property, rights, liabilities and obligations of an undertaker to whom this Part of this Act applies, shall on the vesting date vest by virtue of this Act and without further assurance in such area board as may be determined by order of the Minister."

I think he had in mind that that section, *prima facie*, would point to the conclusion that one would expect to find the gas boards with the same rights in this respect as the old gas companies or gas undertakings had under the earlier legislation. I find it unnecessary to deal with that aspect of the matter or to come to a final conclusion on it, but I will say a word or two about it. The predecessors of paras. 34 (1) and 35 (1) were to be found in s. 21 and s. 22 of the Gasworks Clauses Act, 1871, which were amended by the Gas Undertakings Act, 1934, s. 21. There was evidence that s. 21 of the Act of 1871, which was the predecessor of para. 34 (1), had been regarded by gas undertakings as authorising entries such as were made in the present case. It is certainly capable of that construction, but the structure of the provisions which are now found in paras. 34 and 35 were dealt with in a different way in the Act of 1871. Section 21, after using words which, for the present purposes, are similar to the words in para. 34 (1) provided:

" . . . and if any person hinder such officer . . . as aforesaid at any reasonable time, he shall for every such offence forfeit to the undertakers a sum not exceeding £5."

There was an argument open that that was the only sanction, and that, if someone seeking to inspect met with obstruction, all he could do was to take out a summons and could not enter forcibly. I do not say that that would be right, but it was a possible argument and it might have been reinforced by the fact that when one comes to s. 22, the predecessor of para. 35, there is there, as there is not in s. 21, a reference to the repair of damage caused by entry. What might have been decided about those sections, if they had come before the courts, is a question on which it is unnecessary to speculate. The difficulties, if any, seem to me to have been cleared up by the form which the legislation now takes, and to which I have referred, in sched. III to the Gas Act, 1948.

Counsel for the plaintiff criticised that part of the judgment in which the learned judge said:

"If a forcible entry under para. 35 . . . when the premises were unoccupied was the only case where a forcible entry doing damage was required to be made good, one would have expected para. 36 in terms to have limited the liability to make good to an entry under para. 35. It does not."

In substance I agree with that conclusion. Paragraph 36, with its reference to "entry," follows on two paragraphs dealing with "entry," and I see no reason of construction why it should not be construed as applying to both the paragraphs which immediately precede it. For these reasons I think the learned judge came to the right conclusion, and this appeal must be dismissed.

JENKINS, L.J.: I agree. It is, perhaps, worth while adding a reference to para. 14 (3) of sched. III to the Act of 1948, as it is a provision on which some reliance was placed by counsel for the board. That sub-paragraph occurs in a paragraph dealing with the keeping of meters in order, and provides:

"The board shall have access to and be at liberty to remove, inspect and replace any meter at all reasonable times . . ."

It was referred to by counsel for its use of the expression "shall have access," and I think there is some force in the argument based on the contrast between that expression, "shall have access," and the expressions "may . . . enter" or "it shall be lawful . . . to enter" which occur in para. 34 (1) and para. 35 (1) of the schedule. The contrast seems to me to suggest that whereas in the matter dealt with by para. 14 (3), a right of access is conferred on the board, in para. 34 to para. 37 something more than that is being dealt with. It is a power of entry which might, in relation to the matter dealt with by para. 14 (3), be described as a power ancillary to the right of access, a power which, in that particular case, would make the right of access effective against the will of the occupier of the house.

As to para. 34 (1), on the construction of which the case ultimately depends, I have little to add to what my Lord has said. The argument of counsel for the plaintiff against the view that this paragraph authorises forcible entry turned, so far as the language of para. 34 (1) itself was concerned, mainly on the words

"may at all reasonable times on the production of some duly authenticated document showing his authority . . ."

Counsel suggested that the words "may at all reasonable times" would be wholly inappropriate if it was contemplated that a representative of the board could effect an entry forcibly whether the house was occupied or not, but it has to be borne in mind that obstruction of the duly authorised representative of the board constitutes an offence under para. 37 for which a fine is exigible. The

words "may at all reasonable times" in para. 34 (1) would thus be apt to deal with the case of an unseasonable visit by the representative of the board, perhaps in the small hours of the morning, and would make it clear that, if the occupier was in bed at the time and proposed to remain there, leaving the door locked and bolted, he would not, in such circumstances, have committed an offence for which he was liable to be tried under para. 37. Beyond that, it is to be noticed that the expression "at all reasonable times" occurs also in para. 35 (1), which admittedly, and, indeed, expressly, includes the case of unoccupied buildings. As to the words in para. 34 (1) "on the production of some duly authenticated document showing his authority," I confess that I was impressed by the argument founded on those words at an early stage in our hearing of the case, but I now find myself satisfied that it cannot reasonably bear the construction sought to be placed on it by counsel for the plaintiff. He says, in effect, that the right of entry arises only on production of some duly authenticated document showing the authority of the person seeking entry to somebody authorised to admit him—that is to say, to somebody on the premises. I find that construction, in the context, impossible to accept. It would narrow down the right of entry, so far as I can see, to the case where there was somebody on the premises who opened the door, and, on seeing the document of authority, let the representative of the board into the premises, and entry would be unlawful, not only in the case contended for by counsel, i.e., the case which actually happened here where there was something in the nature of a forcible entry, but also in the case where the front door of the premises was actually standing open but there was nobody at home and, therefore, nobody to whom the document of authority could be produced. That seems to me to be a *reductio ad absurdum* of the argument, and it constrains me to take the view that "on the production of some duly authenticated document showing his authority" simply means "subject to the production, when called on, of such a document."

A further argument of counsel for the plaintiff was that under para. 35 (1), notice is expressly required, whereas there is no such requirement under para. 34 (1). I think the answer to that distinction is the one given by my Lord. The difference between the objects of the two paragraphs is this. Paragraph 34 is concerned with inspection of the meters, fittings and works for the supply of gas and ascertainment of the quantity of gas consumed or supplied, matters which involve no radical alteration in the fixtures on the premises. Paragraph 35 (1) is directed to the removal of pipes, meters, fittings or apparatus through which the supply is given to the premises in cases in which the supply is, for one reason or another, to be discontinued. The object of the visit there, therefore, is to carry out works which may affect the condition of the premises and may raise a question of who was the owner of some particular fitting or some question of that sort. In cases of that kind it would be desirable that notice should be given, not merely because the board intends to enter the premises, but because it is intended that work shall be carried out on the premises which may concern the interests of the owner or occupier. In my view, therefore, that distinction throws little light on the question which we have to decide. Paragraph 35 (1), in my view, is more important in that it must be construed as extending to forcible entry, where necessary, inasmuch as it includes unoccupied premises, and the power would be idle as regards unoccupied premises if it only extended to premises where there was, for example, some door ajar or window open so that entry could be obtained without doing anything amounting, even technically, to a forcible entry. Paragraph 35 (3) also assists the defendants' side of the matter, for that is the paragraph which deals with an escape of gas—

deals, that is to say, with a state of emergency which might be fraught with grave danger to anyone in the vicinity. Counsel for the plaintiff, as I understood him, conceded that in that case the power to enter must, as a matter of common sense, be taken to extend to forcible entry in order to make the provision effective. Thus, in addition to the disputed provision in para. 34 (1), there are provisions in para. 35 (1) and (3) for entry in circumstances in which forcible entry must be intended to be included.

Finally, in para. 36 there is a provision extending to all cases in which entry has been authorised in the preceding sections, and it says:

"Where, in pursuance of any powers conferred by this schedule, entry is made on any premises by an officer of an area board, the officer shall ensure that the premises are not left less secure by reason of the entry, and the board shall make good or pay compensation for any damage caused by the officer in entering the premises, in carrying out any inspection or work therein or in making the premises secure."

Whatever might be said of para. 34 (1) if it stood alone, it seems to me that, when it is read in conjunction with para. 35 (1) and (3) and para. 36, the conclusion is irresistible that in each and every one of the cases mentioned, including the case under para. 34 (1), the enactment contemplates, and, on its true construction, enacts, that entry may be effected even though it has to take the form of a forcible entry. Paragraph 36 says in terms that the officer shall ensure that the premises are not left less secure by reason of the entry. That, to my mind, unmistakably indicates that the case is contemplated in which a lock has to be forced, or a window opened, or something of that kind done, which, if left in that state would make the premises less secure. Then there is a reference to "any damage caused by the officer in entering the premises." That, again, strongly indicates something in the nature of forcing a door or the catch of a window. No distinction is made in para. 36 between the various cases which have been dealt with in the preceding paragraphs, and I think it shows that all of them are treated on the same footing and that in every case a forcible entry, where necessary, in the particular circumstances, is contemplated and allowed under the Act.

I think no useful purpose would be served by discussing in detail the provisions of the Gasworks Clauses Act, 1871. Suffice it to say that, in my view, it is reasonably plain, on the construction of the provisions now in force, that forcible entry in a case like the one now before the court is authorised. I think there might have been more room for argument on the matter had it still turned on the terms of the legislation of 1871, but that is not the question we have to decide. So far as the Act of 1948 is concerned, I have no doubt that the learned judge reached a right conclusion on the true construction of the relevant provisions. I agree, therefore, that the appeal fails and must be dismissed.

HODSON, L.J.: The question in this appeal depends on the construction of para. 34 to para. 37 inclusive of sched. III to the Gas Act, 1948. The learned judge placed a construction on them with which I agree and with the reasons for which I also agree. I think that the construction, that forcible entry, where necessary, is contemplated, is reinforced, as counsel for the defendants pointed out, by reference to para. 14 (3) of the schedule, which provides that the board shall have access to premises for the purpose of the inspection of meters. As he said, it is difficult to see the necessity for para. 34 unless that paragraph justifies forcible entry. I mention that because I think it has some bearing on another matter which has been discussed, viz., the effect of the Acts of 1871 and 1934, because in the Act of 1871, as counsel for the defendants also pointed out,

by s. 19 the undertakers had the right of access to premises for the purpose of inspection. That reinforces the conclusion at which the learned judge arrived, that even under the old legislation the position was the same, although I agree with my Lords that the position is not so clear under the earlier Acts as it is under the Act of 1948. I agree that the appeal fails and should be dismissed.

Appeal dismissed.

Solicitors: *Hamilton-Hill & Evershed* (for the plaintiff); *Avery, Son & Fairbairn* (for the gas board).

G.F.L.B.

KING'S BENCH DIVISION

(LORD GODDARD, C.J., SLADE AND DEVLIN, JJ.)

Nov. 2, 20, 1951

REX v. FULHAM, ETC., RENT TRIBUNAL. *Ex parte GORMLY*

Rent Control—Rent tribunal—Jurisdiction—Rent of premises entered in register after reference—Further reference by new tenant with view to reduction—No change of circumstances alleged—Furnished Houses (Rent Control) Act, 1946 (9 and 10 Geo. 6, c. 34), s. 2 (2).

A change of tenancy does not confer jurisdiction on a rent tribunal, in the absence of any alleged change of circumstances, to entertain a further application either by the original tenant or by his successor for the reduction of the rent of furnished premises when the tribunal has already reduced the rent without specifying a period for which the rent as reduced is to apply, and the rent as reduced has been entered in the register required to be kept by s. 3 of the *Furnished Houses (Rent Control) Act, 1946*.

MOTION for order of *certiorari*.

On July 20, 1949, the applicant, James Michael Gormly, applied as landlord to the Fulham, etc., Rent Tribunal to determine the reasonable rent of premises at 23, Kenilworth Road, Ealing, which were then let by him on a monthly tenancy as a furnished flat to one Mrs. Johnson at four guineas a week. On Aug. 25, 1949, the tribunal fixed the rent at £208 per annum, thereby reducing the original rent by 4s. per week. Subsequently, Mrs. Johnson quitted the flat, which was afterwards let to one Amos Wilson. On Sept. 26, 1950, on Wilson's application, the tribunal purported to reduce the rent from £4 to £2 per week, but in April, 1951, that decision was quashed on *certiorari*. On May 12, 1951, Wilson again referred his contract to the tribunal as an original reference and not as one for consideration on a change of circumstances. On July 16, 1951, the tribunal made their adjudication. It was set out in the form known as F.R. 10 prepared by the Minister of Health for notifying decisions, and it was in these terms: "Under s. 2 of the *Furnished Houses (Rent Control) Act, 1946*, I have to notify you that the rent fixed by the tribunal for the premises specified in the schedule below is entered at (6) of the schedule, and the rent is so fixed for the period entered at (7) or, if no such period is entered, for the duration of the Act. It will be lawful, however, for the lessor or the lessee or the local authority to refer the case to the tribunal for re-consideration of the rent so entered on the ground of change of circumstances . . ." The schedule stated that the rent was reduced from £208 to £132 per annum, the period in respect of which the rent was so fixed being left blank. In the determination of Aug. 25, 1949,

against the period in respect of which the rent was fixed the words "no variation" had been entered, and that determination had been duly registered in the register kept under s. 3 of the Act. The applicant obtained leave to apply for an order of *certiorari* to quash the determination of the tribunal of July 16, 1951, on the grounds (a) that the tribunal had no jurisdiction to make the determination, and (b) that the tribunal, having by their decision of Aug. 25, 1949, reduced the rent from £4 4s. to £4 a week, in consequence whereof the rent of £4 a week was entered in the register, the tribunal had no jurisdiction to reduce the rent of the premises further except on the ground of change of circumstances, which was at no time alleged.

R. B. Willis for the landlord.

J. P. Ashworth for the tribunal.

Cur. adv. vult.

Nov. 20. The following judgments were read.

LORD GODDARD, C.J.: This is an application by the landlord for an order of *certiorari* to bring up and quash a decision of the tribunal dated July 16, 1951, whereby they reduced the rent of the premises, 23, Kenilworth Road, Ealing, from £208 to £132 per annum. On July 20, 1949, the landlord applied to the tribunal to determine the reasonable rent of the flat, which was then let on a monthly tenancy as a furnished flat to one Mrs. Johnson at four guineas a week. On Aug. 25, 1949, the tribunal fixed the rent at £208 per annum, thereby reducing the original rent by 4s. per week. Mrs. Johnson subsequently quitted the flat, which was afterwards let to a Mr. Wilson. On Sept. 26, 1950, on Wilson's application, the tribunal purported to reduce the rent from £4 a week to £2 10s., but for reasons into which it is not necessary to enter that decision was quashed on an application for an order of *certiorari* by this court in April of this year. On May 12 Wilson again referred his contract to the tribunal, who heard the case on July 13. The matter was referred to the tribunal as though it was an original reference and not as one for re-consideration on any alleged change of circumstances, and the chairman of the tribunal, who has made an affidavit in the matter, agrees that the matter was dealt with on the footing of its being an original reference.

The determination of the tribunal is set out in a form known as F.R.10. This is not a statutory form but is one prepared by the Minister of Health for notifying decisions, and it is in these terms:

"Under s. 2 of the Furnished Houses (Rent Control) Act, 1946, I have to notify you that the rent fixed by the tribunal for the premises specified in the schedule below is as entered at (6) of the schedule, and the rent is so fixed, for the period entered at (7) or, if no such period is entered, for the period of duration of the Act. It will be lawful, however, for the lessor or the lessee or the local authority to refer the case to the tribunal for re-consideration of the rent so entered on the ground of change of circumstance.

Your attention is directed to the extracts from the Act printed overleaf."

The schedule then sets out the specification of the premises let, the names and addresses of the lessor and lessee, states that the premises were nearly fully furnished, and that the services provided by the lessor were hot water from the bathroom geyser the lessor having undertaken to pay for the gas for this hot water, and that the rent was reduced by the tribunal from £208 per annum to £132 per annum. The extracts from the Act which are printed on the back of the determination are s. 4, s. 5, s. 9 and s. 11. The period in respect of which the rent is so fixed was left blank. In the earlier determination of Aug. 25, 1949,

against item (7) in the determination, namely, the period in respect of which the rent is so fixed, the words "No variation" had been entered, and that determination had been duly registered in the register kept for the purposes of the Act.

The grounds on which the relief was sought are (a) that the tribunal had no jurisdiction to make the decision, and (b) that the tribunal having, by their decision of Aug. 25, 1949, reduced the rent of the premises from £4 4s. a week to £4 a week, in consequence whereof the rent of £4 a week for the said premises was so entered in the register kept by the borough council, the tribunal had no jurisdiction to reduce the rent of the premises further except on the grounds of change of circumstances, which was at no time alleged. On the other hand, it was argued on behalf of the tribunal that the determination in August, 1949, was on a reference of a then existing tenancy, that it was only between the landlord and Mrs. Johnson, who was then the tenant, and that it was open to any subsequent tenant to refer the new letting to the tribunal, who were entitled to hear the case *de novo* and without regard to whether there had been any change of circumstance or not. If the form F.R. 10 were a statutory form it would, in my opinion, not be arguable that the tribunal, having once reduced the rent and stated no period for which the rent so reduced was to remain, could again reduce it. Their decision would have been that the rent remained for the period of the duration of the Act. The form, however, is not a statutory form, though at the same time it seems to me to have strong persuasive force as showing that, in the opinion of the department responsible for the administration of the Act, if no special period was prescribed, the determination held so long as the Act was in force, irrespective of any change of parties to the tenancy.

We have to determine the question, and the first section which we have to consider is s. 2 (1) of the Furnished Houses (Rent Control) Act, 1946. This sub-section provides, omitting immaterial words, that

"Where a contract has . . . been entered into whereby one person (hereinafter referred to as the 'lessor') grants to another person (hereinafter referred to as the 'lessee') the right to occupy as a residence a house or part of a house . . . in consideration of a rent which includes payment for the use of furniture or for services . . . it shall be lawful for either party to the contract . . . to refer the contract to the tribunal for the district, and where any such contract . . . is so referred to the tribunal, they may by a notice in writing . . . require . . . such information as they may reasonably require . . ."

By sub-s. (2) the tribunal are to enter on consideration of the reference and, after making such inquiry as they think fit and giving the parties the opportunity of being heard, they shall approve the rent payable under the contract or reduce it to such sum as they may in all the circumstances think reasonable, or may, if they think fit, dismiss the reference. Sub-section (3) provides:

"Where the rent payable for any premises has been entered in the register in accordance with the provisions hereinafter contained, it shall be lawful for the lessor or the lessee or the local authority to refer the case to the tribunal for re-consideration of the rent so entered on the ground of change of circumstances . . ."

In that case power is given to the tribunal, if they think fit, to increase the rent. By sub-s. (5) an approval, reduction, or increase may be limited to rent payable in respect of a particular period, and by sub-s. (6)

" . . . a tribunal shall not be required to entertain a reference made otherwise than by the local authority if they are satisfied, having regard to the length of time elapsing since a previous reference made by the same party or to other circumstances, that the reference is frivolous or vexatious."

Section 3 provides for the local authority keeping a register for the purposes of the Act and prescribes what is to be entered therein, including the rent as approved, reduced, or increased, and, where the approval, reduction or increase is limited in respect of a particular period, a specification of that period. In passing, it may be observed that by s. 11 a certified copy of the register shall be receivable in evidence in all courts and in any proceedings, and that any person requiring a certified copy shall be entitled to obtain it on payment of the prescribed fee. The regulations made under the Act provide that the register shall be open to public inspection at the offices of the local authority during their normal hours of business. Section 4 (1) provides:

" Where the rent payable for any premises is entered in the register under the provisions of this Act, it shall not be lawful to require or receive—
(a) on account of rent for those premises in respect of any period subsequent to the date of such entry, (or, in a case in which a particular period is specified, in respect of that period) payment of any sum in excess of the rent so entered."

Section 9 (1) provides:

" A person who requires or receives any payment in contravention of s. 4 of this Act shall be guilty of an offence and be liable . . . to a fine not exceeding £100 or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment . . . "

and, in addition, may be ordered to repay the amount paid.

It is true that on reading s. 2 (1) it would appear that any contract in respect of furnished premises can be referred either by a landlord or a tenant. In my opinion, it is necessary to consider the Act as a whole and to see whether, from the other sections to which I have referred, it is possible for any number of applications to be made by successive tenants who do not allege that any change of circumstances has taken place since the rent was determined on the first application. If on the first application the rent was fixed for a particular period no one would doubt that on the expiration of the period a further application could be made, whether by the original tenant or one to whom the premises had been let subsequently, and that whether there had been a change of circumstances or not.

Counsel for the landlord argued that, once the rent had been fixed, it applies *in rem* to the premises for the period for which it had been fixed, and, if no period had been fixed, then for the duration of the Act, and he placed reliance on *Rex v. Fulham, Hammersmith & Kensington Rent Tribunal. Ex p. Marks* (1). The attention of the court in that case was not called to the decision of the Court of Appeal in *Lazarus-Barlow v. Regent Estates Co., Ltd.* (2) in which the Court of Appeal had considered how far it was right to refer to a determination under the Rent Control Acts as being equivalent to a judgment *in rem*. EVERSHED, L.J., said:

" The words 'the Acts apply *in rem*' have been used, by way perhaps

(1) 115 J.P. 453; [1951] 2 All E.R. 465; [1951] 2 K.B. 694.

(2) [1949] 2 All E.R. 118, 122; [1949] 2 K.B. 465, 475.

of analogy, to illustrate the point that, given certain facts, the Acts will or may operate not merely in relation to a particular tenancy of some premises and between the parties to that tenancy, but in relation to the premises as such, for example, 'by attaching to a dwelling-house a standard rent which applies to the whole house, and, where necessary, also applies by apportionment to every part': *per* GREER, L.J., in *Lloyd v. Cook* (1); and see also the earlier case of *King v. York* (2) where a Divisional Court held that it was the house itself and not a particular tenant that was protected. Though we have examined carefully all the cases cited to us in argument it is clear that in none of them was the point raised, still less decided, that a determination of the facts essential to and involving the applicability of the Acts to any premises pronounced by a court of competent jurisdiction operated as conclusive evidence for or against persons not parties or privies to the judgment."

I do not understand that the Court of Appeal in that case meant to overrule the earlier decisions which have, I think, laid down that a standard rent applied to the *res*, that is, the house, and so would remain as the rent for all purposes, subject only to permitted increases. For my part, I do not propose to decide this case on that ground. It will be observed that s. 2 (2) refers to "the rent payable under the contract" which may be approved or reduced, and s. 2 (3) and s. 4 (1) refer to "the rent payable for any premises," and that, in my opinion, means the rent payable in consequence of the decision of the tribunal and it is that rent which has to be entered in the register. What, I ask myself, is the object of the register which the Act requires to be kept? It cannot, I think, be merely for the purpose, as counsel for the tribunal suggested, of enabling a prospective tenant or someone who was, perhaps, thinking of buying the premises to test the market in the sense of finding out the sort of rents which were being approved or fixed by the local tribunal. I think the object must be to enable any person to see what the particular rent is for particular premises, though it may be only for a particular period. The keeping of registers by local authorities is a familiar feature of legislation dealing with rent control. Before the war, when Acts were passed dealing with the de-control of premises, registers had to be kept of those premises which had been, but were no longer, subject to rent control, and entry in the register was necessary to perfect the de-control. This, no doubt, was to enable persons to find out conclusively whether the Acts applied to a particular house or not. Under the Landlord and Tenant (Rent Control) Act, 1949, which deals with the fixing by a tribunal of standard rents of premises let for the first time after Sept. 1, 1939, a register has to be kept of the determinations. This seems to me to point strongly to the intention that decisions of tribunals should be registered for the information of the public, that the rent so registered should be the rent payable in respect of the premises and not merely the rent payable between two particular parties who first took the case to the tribunal, and that that rent should remain until it is altered by the tribunal on an application made under s. 2 (3) on a consideration of changed circumstances. To my mind, s. 4 of the Act is even more compelling. Once the rent payable for any premises is entered in the register it becomes unlawful for a landlord not merely to receive, but also to require, which I interpret as meaning to ask for, any increased rent, and, if he does, he is exposed to the penalty of six months' imprisonment or a fine of £100, or both. Section 4 and

(1) 92 J.P. 199, 206; [1929] 1 K.B. 103, 135.

(2) (1919), 88 L.J.K.B. 839.

s. 9, which between them create the offence and impose the penalties, are printed on the notice of determination which is sent out.

In my opinion, it would be most undesirable to give an interpretation to this Act which would leave the question whether a criminal offence had been committed to be determined on nice considerations of s. 2, and I cannot think it was intended that on a change of tenancy a landlord could be allowed to ask for a higher rent than that which was entered in the register and could then say he had committed no offence against s. 4 because the tenant might be entitled to go to the tribunal and ask them once again to consider the rent. Equally it seems to me that the Act can scarcely have contemplated a landlord being harassed by repeated applications where no change of circumstances was alleged, and it seems to me that, if the argument for the tribunal is right, although on the first application they may have fixed a rent for a particular period, such as six months, if within that period a further letting took place, as well might be the case on a weekly or monthly tenancy, the landlord might again be taken to the tribunal by a tenant who sought a reduction. It was suggested in argument that there might be a danger of a landlord in collusion with some other person making an application to the tribunal to fix a rent which, in fact, was more than the premises were worth, so that he could charge subsequent tenants more than the premises were worth. From what this court knows of the proceedings of the tribunals I think it is very unlikely that any such thing could happen. Our experience is that the tribunals always visit the premises and see them for themselves. There is the further protection that the local authority can, if necessary, intervene, and there is also the consideration that, if some collusive proceedings were taken, it would amount to a fraud on the tribunal, and where a fraud was proved I have little doubt that this court could intervene if necessary by an order of *certiorari* to get rid of a decision which the tribunal had been misled into making. In my opinion, the decision of Aug. 25, 1949, stands, and, as no change of circumstances was alleged, the tribunal had no jurisdiction to reduce the rent which had been registered, and for these reasons I think the order for *certiorari* must go. I would add that **DEVLIN, J.**, who has read this judgment, agrees with it.

SLADE, J.: I agree. I think the point which arises for decision in this case has already been concluded in the landlord's favour by the decision of this court in *Rex v. Fulham, Hammersmith & Kensington Rent Tribunal. Ex p. Marks* (1) and by the decision of the Court of Appeal in *Rex v. Paddington & St. Marylebone Rent Tribunal. Ex p. Bedrock Investments, Ltd.* (2) which this court applied in *Rex v. Fulham, Hammersmith & Kensington Rent Tribunal. Ex p. Marks* (1). It was implicit in each of those two decisions, and formed one of the reasons for the decision both of the Court of Appeal in *Rex v. Paddington & St. Marylebone Rent Tribunal. Ex p. Bedrock Investments, Ltd.* (2) and of this court in *Rex v. Fulham, Hammersmith & Kensington Rent Tribunal. Ex p. Marks* (1), that a determination and registration under the Furnished Houses (Rent Control) Act, 1946, operated *in rem*, at least to the extent that it was not limited to the particular tenancy of the particular premises which came before the tribunal and which resulted in the registration, but that it operated to determine the status of the premises as such. I do not read either of those decisions as being limited to the particular contract, and I think it was those considerations which **EVERSHED, L.J.**, had in mind when he stated in the passage which my Lord

(1) 115 J.P. 453; [1951] 2 All E.R. 465; [1951] 2 K.B. 694.

(2) 112 J.P. 367; [1948] 2 All E.R. 528; [1948] 2 K.B. 413.

has cited in *Lazarus-Barlow v. Regent Estates Co., Ltd.* (1) that the words "the Acts apply *in rem*" had been used to show that the Acts will or may operate, not merely in relation to a particular tenancy of the premises and between the parties to that tenancy, but in relation to the premises as such.

It is true that *Lazarus-Barlow v. Regent Estates Co., Ltd.* (1) was not cited to the court in *Rex v. Fulham, Hammersmith & Kensington Rent Tribunal. Ex p. Marks* (2), but I understand *Lazarus-Barlow v. Regent Estates Co., Ltd.* (1), a decision of the Court of Appeal, to decide merely that the fact that the Rent Restrictions Acts might operate *in rem* did not mean that judgments under those Acts were conclusive against all persons and for all purposes, for example, to decide so as to bind persons who were neither parties nor privies to the decision in relation to facts which arose for determination whether a particular letting, meaning thereby a letting for the purposes of the Rent Restrictions Acts, was or was not a letting to which the Acts applied on a material date, such as Sept. 1, 1939. That, I think, is all that *Lazarus-Barlow v. Regent Estates Co., Ltd.* (1) decided, and that it in no way undermined the many determinations of the Court of Appeal for the purposes of the Rent Restrictions Acts that a determination of the standard rent operated *in rem* so as to fix the status of the premises. In my view, in the two cases I have mentioned the court came to the conclusion, and it was one of the reasons for their decision, that a registration of the rent under the Furnished Houses (Rent Control) Act, 1946, also operated *in rem* to that extent. That is why I think the point which arises for decision in this case has already been concluded in the landlord's favour, both by the decision of the Court of Appeal, which binds us, in *Rex v. Paddington & St. Marylebone Rent Tribunal. Ex p. Bedrock Investments, Ltd.* (3), and by the decision of this court in *Rex v. Fulham, Hammersmith & Kensington Rent Tribunal. Ex p. Marks* (2), which, whether it strictly binds us or not, I should certainly follow.

Order for certiorari.

Solicitors: *Freeborough & Co.* (for the landlord); *Solicitor, Ministry of Health* (for the tribunal). T.R.F.B.

- (1) [1949] 2 All E.R. 118, 122; [1949] 2 K.B. 465, 475.
- (2) 115 J.P. 453; [1951] 2 All E.R. 465; [1951] 2 K.B. 694.
- (3) 112 J.P. 367; [1948] 2 All E.R. 528; [1948] 2 K.B. 413.

COURT OF APPEAL

(SIR RAYMOND EVERSHED, M.R., DENNING AND MORRIS, L.JJ.)

Nov. 22, 23, 1951

TEMPEST v. SNOWDEN

Malicious Prosecution—Honest belief of defendant in plaintiff's guilt—Form of question for jury.

Where, in an action for malicious prosecution which is tried with a jury, the question of honest belief is in issue the form of question to the jury should be: "Did the defendant honestly believe in the plaintiff's guilt?" or "Did the defendant honestly believe in the charges he was preferring?", and should not include any reference to reasonable or probable cause for the action of the defendant as, e.g., in the question: "Did the defendant honestly believe that there were reasonable grounds for instituting the prosecution?"

APPEAL by the defendant in an action for malicious prosecution from a judgment of CASSELS, J., sitting with a jury at Leeds Assizes, dated July 4, 1951.

Granville Sharp, K.C., and *Snowden* for the defendant.

Beyfus, K.C., and *Forrester-Paton* for the plaintiff.

SIR RAYMOND EVERSLED, M.R.: This is an appeal by the defendant from a verdict of the jury and the judgment of CASSELS, J., in an action for malicious prosecution in which there was judgment for the plaintiff for damages amounting to £205 5s. The only matter which counsel for the defendant relied on before us was the impropriety of the first question put by the judge to the jury. In those circumstances it is right to say that we have heard nothing on the merits from counsel for the plaintiff.

The plaintiff as a salesman had been in the service of a company of which the defendant was at all material times the chairman of the board of directors. The company was concerned in the business of selling such articles as burglar alarms, amplifiers, and the like. In May, 1950, the defendant laid an information before the stipendiary magistrate at Bradford, as a result of which two summonses were served on the plaintiff charging him, on one summons, with larceny as a servant of burglar alarm apparatus, and, on the second summons, with fraudulent conversion of the same articles. After an adjournment the first summons came on for hearing before the magistrate who took the view that there was no evidence to support it, and he, therefore, dismissed the summons without calling on the plaintiff to answer the charge made against him. The second summons for fraudulent conversion was not proceeded with. The plaintiff then issued the writ in the present action for malicious prosecution, claiming general damages and, as special damages, £5 5s. costs which the plaintiff had had to pay to his solicitor in excess of what he recovered from the defendant.

It is clear that in an action of this character a plaintiff must establish *inter alia* the following two propositions:—(i) that the defendant acted without reasonable and probable cause; and (ii) that the defendant acted maliciously. Two questions were submitted by the judge to the jury. Question 1 was: "Did the defendant honestly believe that there were reasonable grounds for instituting the prosecution?" Question 2 was: "Has the plaintiff satisfied you that the defendant was actuated by malice?" The jury answered the first question negatively and the second question affirmatively. The judge held that the defendant had acted without reasonable and probable cause, and judgment for the plaintiff was entered for £205 5s., the sum of £200 being the amount of the general damages.

It must now be taken as clearly established that the first of the two propositions which I have stated, though it may well be a matter of fact, is a question for the judge and not for the jury. The argument of counsel for the defendant may be put in this form. "By inviting the jury to answer the question: 'Did the defendant honestly believe that there were reasonable grounds for instituting the prosecution?' the minds of the jury were directed to, or, at least, were liable to be distracted by, a consideration of the question: 'Were there reasonable and probable grounds for the prosecution?'—the question which is for the judge and not for the jury." Counsel for the defendant argued that, the jury's mind being affected by this difficult problem, they came to the conclusion that there were no reasonable or probable grounds for the prosecution, more particularly, perhaps, because the magistrate dismissed the charge without calling on the plaintiff to answer it. If, said counsel, that was the thing they had in their minds, it would be easy enough for the jury to conclude: "Well, if there

really was no reasonable and probable cause the defendant could not honestly have thought that there was," and, therefore, they answered the first question negatively. If they thought the defendant honestly did not think there was a case against the plaintiff, then, again, it would be a very easy step for them—perhaps a necessarily logical step—to conclude that he acted out of malice. Thus, argued counsel for the defendant, the whole verdict is vitiated by the jury's mind having been deflected in the first instance to a consideration of a matter not proper for them to consider.

I turn now to *Herniman v. Smith* (1). The speech of LORD ATKIN had the concurrence of LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, LORD MAUGHAM and LORD ROCHE, none of whom made any addition of his own. I have read and re-read LORD ATKIN's speech, and, with the utmost possible respect, I have not found it in all respects easy to follow. I say that because in the course of the speech various questions seem to be posed and treated almost as if they were the same questions in a different form. The question is put ([1938] 1 All E.R. 8): "... was there evidence of the want of reasonable and probable cause for the prosecution?" Then the more general question is posed: "was there reasonable and probable cause," and, finally, the question: "did the defendant honestly believe in the plaintiff's guilt?" The questions are not the same. They are not synonymous. The question whether there is any evidence of want of reasonable and probable cause is, I should say, a question of law. The general question: Was there reasonable and probable cause, as LORD ATKIN himself states, is a question of fact, although it is a question which has to be determined by the judge, and not left to the jury. That question was paraphrased by HAWKINS, J., in *Hicks v. Faulkner* (2) and that paraphrase was accepted by LORD ATKIN. It is as follows:

"Now I should define reasonable and probable cause to be, an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed."

If that is the meaning of the question: "Was there reasonable and probable cause," it is no wonder that it is a question not to be left to a jury.

However that may be, I think the difficulty that I have experienced depends on the particular circumstances of that case, and it is a trite remark that every judgment must be related to the facts which were before the court. I think, therefore, that it is not taking up time unduly if I refer to this extent to the facts of *Herniman v. Smith* (1). The relevant question which TALBOT, J., had put to the jury was: "Has it been proved that the defendant commenced and proceeded with the prosecution without any honest belief that the plaintiff was guilty of fraud?" The Court of Appeal held that there was no evidence which would justify the judge in leaving that question to the jury. In any case a judge can rule at an appropriate stage that there was no evidence either on which the negative question can be put or no evidence on which the second and affirmative question relating to malice can be put. It is conceivable that the judge in this case, if he had been invited to do so, would have ruled that there was no evidence of want of honest belief in the plaintiff's guilt, but I have no doubt that for a very proper reason he was not asked and was not minded so to rule. It was the gist of the plaintiff's case that the defendant never did have

(1) [1936] 2 All E.R. 1377; *affd.* H.L., [1938] 1 All E.R. 1; [1938] A.C. 305.

(2) (1881), 46 J.P. 420; 8 Q.B.D. 167.

any honest belief in these charges which he preferred, and the defendant has not argued before us that there was no evidence to support the jury's first answer. I think, therefore, that the judge was concerned by the form of question to invite the jury to tell him, in their view, the answer to the question whether the defendant honestly believed in the charges he was preferring—that is, in the guilt of the plaintiff.

The question of the existence or absence of honest belief may not be a relevant question in every case, but that that may be a proper question to put to a jury in some cases appears to be clearly established from a passage in LORD ATKIN's speech. After referring to the statement of HAWKINS, J., and criticising the view which he thought had, perhaps, become prevalent—that the questions which were put by CAVE, J., in *Abrath v. North Eastern Ry. Co.* (1) should be put in all cases—LORD ATKIN said:

"This, it seems to me, would be to take the decision of the issue out of the hands of the judge, to whom, in the interests of prosecutor and accused alike, it has been confided. The jury no doubt have important functions to perform. They are to find for the judge what the relevant facts are, when they are disputed. If there is any evidence of a lack of honest belief in the guilt of the accused on the part of the prosecutor, the fact whether he honestly believed or not is a disputed but essential fact, on which the judge is to draw his conclusion, and is a question for the jury."

If I have correctly analysed the matter by reference to LORD ATKIN's speech I think the problem in the present case narrows itself down to this: Did the question which was put to the jury have the emphasis, so to speak, put on the initial words: "Did the defendant honestly believe?", or was there so much emphasis on the latter words, "reasonable grounds for instituting the prosecution," that the jury were involved in answering a question which it was not for them to answer. I have found this a difficult matter, but on the whole I do not think that the court is justified in assuming against the jury that they were misled by the latter part of the question. I think the question was intended to be (and I am not satisfied that it was not) treated by the jury as being an invitation to them on all the facts given in evidence to determine the disputed, but essential, fact in the present case: Did the defendant honestly believe in the charges he was making? I am not prepared to make the assumption which counsel for the defendant invited us to make—which, if made, would vitiate the whole verdict.

In case it be of use in future cases it is desirable that, where the question of honest belief is an issue, the form of the question should be: "Did the defendant honestly believe in the plaintiff's guilt?" or "Did the defendant honestly believe in the charges he was preferring?", and that it is better not to include in the question any reference to reasonable grounds. I think counsel for the plaintiff may be correct when he says that, if the answer which the jury give to a question so put is that the defendant did not honestly believe in his charges, it must follow that there could not be reasonable and probable cause. I think that is why CASSELS, J., having had this answer of the jury, proceeded to hold that there was no reasonable or probable cause. The fact that the judge did so decide supports the view that the emphasis in his question was to discover for his assistance whether on the evidence there was an absence of honest belief on the defendant's part. If the jury said in answer to that question: "Yes, he did honestly believe" it would not necessarily follow that there was

(1) (1883), 47 J.P. 692; 11 Q.B.D. 440; *affd.* H.L., (1886), 50 J.P. 659; 11 App. Cas. 247.

reasonable and probable cause. That the judge would then have to decide in the light of the expansion of the question enshrined in the judgment of *HAWKINS, J.* He would have to make up his mind whether there were reasonable grounds for the honest belief which was imputed to the defendant. I am bound to say that since this first question is, so to speak, taken out of the hands of the jury and left to the judge, it is not easy to see what real distinction there is in such a case as the present between the two questions posed. If the jury said that the defendant did not honestly believe in the plaintiff's guilt it is difficult to see how they could possibly answer the second question as to malice otherwise than in the affirmative. That, however, is another matter.

For the reasons I have indicated (though I confess to feeling great difficulty in the matter) I think that on the whole this court ought not to interfere with what I take to be the opinion of the jury that the defendant was not honest in taking the proceedings he did and that he acted out of malice. The jury thought the plaintiff should succeed and I do not think we should deprive him of the fruits of his judgment.

DENNING, L.J.: If the facts were as the defendant described them there would be reasonable and probable cause for the prosecution, but, if the facts were as the plaintiff said, there would not be. That crucial difference on the facts was a matter for the jury to decide. The judge would have to take their decision on it before he could decide whether there was reasonable and probable cause for the prosecution.

In my opinion, to determine the question of reasonable and probable cause, the judge must first find out what were the facts as known to the defendant, asking the jury to determine any dispute on that matter, and then the judge must ask himself whether those facts amounted to reasonable and probable cause. In *Herniman v. Smith* (1) **LORD ATKIN** put it quite clearly ([1938] 1 All E.R. 9):

"The facts upon which the prosecutor acted should be ascertained. In principle, other facts upon which he did not act appear to be irrelevant. When the judge knows the facts operating on the prosecutor's mind, he must then decide whether they afford reasonable or probable cause for prosecuting the accused."

If these facts do afford reasonable and probable cause, then the prosecution is justified, and it is not as a rule necessary for an inquiry to be made into the prosecutor's belief. The state of his belief goes to malice, but not, as a rule, to reasonable and probable cause. This view is supported by the observations of **LORD GODDARD, C.J.**, in *Time v. John Lewis & Co., Ltd.* (2), where he said:

"The question whether there was a reasonable or probable cause is not, I think, to be determined subjectively, as has been suggested. It is a question which objectively the court has to decide on the evidence before it."

It is sometimes said that to have reasonable and probable cause there must be an honest belief in the guilt of the accused. I do not think that should be regarded as a universal proposition applicable to all cases. It depends on the particular case. There are many justifiable prosecutions where the prosecutor has not himself formed any concluded belief as to the guilt of the accused. If he is a very fair-minded man he may well say to himself: "The case is so black against the man that I feel I must prosecute, but I am not going to believe him to be guilty unless the court finds him to be so." Such a man would, I should

(1) [1936] 2 All E.R. 1377; *affd.* H.L., [1938] 1 All E.R. 1; [1938] A.C. 305.

(2) 115 J.P. 265; [1951] 1 All E.R. 814; [1951] 2 K.B. 459.

have thought, have reasonable and probable cause for instituting a prosecution even though he did not affirmatively believe the man to be guilty. It is also said sometimes that to have reasonable and probable cause there must be an honest belief that there was reasonable ground for prosecuting. This, again, is by no means always necessary. Let me give another illustration. Take a prosecutor, a fair-minded man, who is personally convinced that the man is guilty, but does not himself think the evidence is sufficient to justify a prosecution. His solicitor advises him that the evidence is sufficient. He may well say to himself: "I do not myself believe there is sufficient evidence, but my solicitor says there is, so I feel justified in going on." If the judge afterwards takes the same view as the solicitor, I should have thought that such a man would have reasonable and probable cause for instituting a prosecution, even though he did not himself affirmatively believe that there were reasonable grounds for it. In support of these views I would refer to *Musgrove v. Newell* (1). In that case the prosecutor had reasonable and probable cause for thinking that certain men had attempted to rob him and for thinking that the accused man was one of them, but, before he launched the prosecution, a constable told him that the accused was a man of good character. This seems to have so shaken the prosecutor's belief in his guilt that he no longer affirmatively believed that the man was guilty. The court held that this did not take away the reasonable cause which existed. *ALDERSON, B.* (1 M. & W. 591), made it clear that the prosecutor's state of belief, after hearing what the constable had to say went only to malice and not to reasonable and probable cause. It has to be remembered that, even though a prosecutor is actuated by the most express malice, nevertheless he is not liable so long as there was reasonable and probable cause for the prosecution. If envy, hatred, malice and all uncharitableness do not deprive him of this defence, I do not see why his state of belief should necessarily do so. The danger of introducing the question of honest belief in all cases, without considering the circumstances of the particular case, is that it places the decision of reasonable and probable cause in the hands of the jury, whereas the law, for good and sufficient reasons, has placed it in the hands of the judge. I do not say that the prosecutor's belief can never come into the question of reasonable and probable cause. If the prosecutor believed that the man was innocent and preferred the charge simply as a means of inducing him to pay over money to him, there would be no reasonable and probable cause for the prosecution because the cause for the prosecution would be, not the facts known to him, but another cause, and an unreasonable one: see *Broad v. Ham* (2). That is, I think, the sort of case which *LORD ATKIN* had in mind when he referred to belief in *Herniman v. Smith* (3). Apart from exceptional cases of that kind, however, I think it right to say that, once the facts as known to the prosecutor are ascertained, the state of his belief goes only to malice and not to reasonable and probable cause.

It is for these reasons that I think the form in which the first question was put to the jury in the present case was not strictly correct, but I can well understand how it came to be put. The real issue depended on whether the plaintiff or the defendant was to be believed. The plaintiff was alleging that the defendant was putting forward a false case, knowing it to be untrue. If the defendant did put forward a false case, he clearly would have no reasonable and probable cause for prosecuting. The only reasonable grounds which he had were those which depended on his own testimony. If he did not honestly believe in those grounds

(1) (1836), 1 M. & W. 582.

(2) (1839), 5 Bing. N.C. 722.

(3) [1936] 2 All E.R. 1377; *affd.* H.L., [1938] 1 All E.R. 1; [1938] A.C. 305.

he was putting forward a false case. If he did honestly believe them, he was putting forward a true case. Hence the judge put the first question to get that issue decided. I would have preferred it to be put more simply—What were the facts known to the defendant? Were they as told by the plaintiff or as told by the defendant? In the circumstances of this case I think the first question came to practically the same thing. If the jury had believed the defendant, they would have answered the question: "Yes". As the answer is "No," they must have believed the plaintiff. If that is the right interpretation of the verdict, it is not a case in which we should interfere. I agree, therefore, that the appeal should be dismissed.

MORRIS, L.J.: I have found myself in full agreement with the judgment delivered by **SIR RAYMOND EVERSHERD, M.R.**, and I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Clutton, Moore & Lavington*, agents for *Ralph C. Yablon & Temple-Milnes*, Bradford (for the defendant); *Ward, Bowie & Co.*, agents for *James A. Lee & Priestley*, Bradford (for the plaintiff). F.G.

CHANCERY DIVISION

(VAISEY, J.)

Nov. 12, 13, 28, 1951

ATTORNEY-GENERAL v. LEEDS CORPORATION

Water Supply—Non-domestic purposes—Washing motor cars—Charge levied on registered owners of all cars in supply area—Burden on owner to show that no water supplied by undertakers used in respect of his car—Leeds Corporation (Consolidation) Act, 1905 (5 Edw. 7, c. i), s. 24.

Under s. 7 of the Leeds Corporation (Consolidation) Act, 1905, with which, by s. 5, were incorporated the Waterworks Clauses Act, 1847 (with certain immaterial exceptions), and the Waterworks Clauses Act, 1863, the corporation were the water undertakers for the city and county of Leeds. Section 21 of the Act of 1905 provided: "In addition to the purposes set out in s. 12 of the Waterworks Clauses Act, 1863, a supply of water for domestic purposes shall not include a supply of water for washing any carriages." By s. 24: "The corporation may supply water for other than domestic purposes on such terms and conditions as the corporation think fit . . . and may if they think fit enter into agreements with respect to any such supply to any person and the moneys payable for the supply of water under this section shall be recoverable in the same manner as water rates." Two resolutions of the corporation, passed in 1926 and 1935 respectively, provided that the water charges for motor cars and tri-cars were to be 3s. for any quarter for which an excise licence was in force in respect of a car. This charge was levied by the corporation (in addition to the water rate, if any, payable for the ordinary water supply for domestic purposes) on every person registered in Leeds as the owner of a car in respect of which an excise licence was in force, and each quarter a demand note was sent to each registered owner demanding payment of the charge in respect of each car registered in his name, even if he had neither asked for, nor received, a supply of water for non-domestic purposes. Unless the registered owner satisfied the corporation (a) that no water supplied by them would be used in connection with any motor vehicle registered in his name, or (b) that the only water supplied by them which would be used in connection with his car was supplied by meter, and, therefore, separately paid for, he was liable for the charge, wherever the car was kept or washed. In an action to determine the validity of the procedure adopted by the corporation in levying this charge,

HELD: the corporation had not exceeded their statutory powers.

ACTION by the Attorney-General, suing on the relation of Automobile Proprietary, Ltd., for an injunction to restrain the defendants, Leeds Corporation, from levying a water rate of 3s. a quarter on every person registered with them as local taxation authority as being the owner of one or more motor cars (including tri-cars) in respect of each such car for which an excise licence was in force, whether or not such person had requested or been furnished with water for washing the car. It was contended for the Attorney-General that the procedure which the corporation had adopted in levying this charge was in excess of their statutory powers.

Sir Andrew Clark, K.C., and Skelhorn for the Attorney-General.

Upjohn, K.C., and Denys B. Buckley for the corporation.

Cur. adv. vult.

Nov. 28. **VAISEY, J.**, read the following judgment. The plaintiff in this action is the Attorney-General suing on the relation of Automobile Proprietary, Ltd., the owner of the Royal Automobile Club. The relator is not joined as a co-plaintiff, but it owns and pays rates in respect of premises known as Post Office House, Infirmary Street, in the city and county of Leeds. The defendants are the corporation for that city and county, and are, by virtue of the Leeds Corporation (Consolidation) Act, 1905, s. 7, the water undertakers for the city and county. The question is whether the corporation are or are not exceeding their statutory powers as such water undertakers by acting in a manner which I will presently describe. Those statutory powers are contained in and conferred by the Act of 1905, to which I will refer as the "special Act". It is a comprehensive statute divided into twenty-nine Parts, 383 sections and fifteen schedules. Only very small parts of it affect the present question.

Section 5 of the special Act incorporates with it certain general Acts, including, in particular, the Waterworks Clauses Act, 1847 (with certain immaterial exceptions) and the whole of the Waterworks Clauses Act, 1863. Section 3 of the Act of 1847 defines the expression "water rate" as including

" . . . any rent, reward, or payment to be made to the undertakers for a supply of water."

Section 68 of the same Act reads:

"The water rates, except as herein-after and in the special Act mentioned, shall be paid by and be recoverable from the person requiring, receiving, or using the supply of water, and shall be payable according to the annual value of the tenement supplied with water, and if any dispute arise as to such value the same shall be determined by two justices."

Section 74 is in these terms:

"If any person supplied with water by the undertakers, or liable as herein or in the special Act provided to pay the water rate, neglect to pay such water rate at any of the said times of payment thereof, the undertakers may stop the water from flowing into the premises in respect of which such rate is payable, by cutting off the pipe to such premises, or by such means as the undertakers shall think fit, and may recover the rate . . ."

in the manner therein mentioned.

Two sections of the Act of 1863 seem to be material, namely, s. 12 and s. 18. Section 12 is:

"A supply of water for domestic purposes shall not include a supply of water for cattle, or for horses, or for washing carriages, where such horses

or carriages are kept for sale or hire or by common carrier, or a supply for any trade, manufacture, or business, or for watering gardens, or for fountains, or for any ornamental purpose."

Section 18 is:

"If any person—first, not having from the undertakers a supply of water for other than domestic purposes, uses, for other than domestic purposes, any water supplied to him by the undertakers; or secondly, having from the undertakers a supply of water for any other than domestic purposes, uses, for any purposes other than those for which he is entitled to use the same, any water supplied to him by the undertakers,—he shall for every such offence be liable to a penalty not exceeding 40s., without prejudice to the right of the undertakers to recover from him the value of the water misused."

Reverting to the special Act, I think that s. 20, s. 21, s. 22, s. 24 and s. 25 are the only material ones for the present purpose. Section 20 reads:

"The corporation shall at the request of the owner or occupier of any dwelling-house or part of a dwelling-house in any street in which any pipe of the corporation shall be laid or of any person who under the provisions of this Act shall be entitled to demand a supply of water for domestic purposes furnish to such owner or occupier or other person a sufficient supply of water for domestic use at the rates not exceeding those hereinafter specified . . ."

The percentages are enumerated in the section and I need not more particularly refer to them, but I note that in the second proviso to that section a reference is made to the supply of "premises" with water. Section 21 is in these words:

"In addition to the purposes set out in s. 12 of the Waterworks Clauses Act, 1863, a supply of water for domestic purposes shall not include a supply of water for washing any carriages."

That is contrary to the decision in *Harrogate Corpn. v. Mackay* (1). Section 22 refers to a "house" being supplied with water, and I venture to pose the question: If a house can be supplied, why not a car? Section 24 and s. 25 are:

"24. The corporation may supply water for other than domestic purposes on such terms and conditions as the corporation think fit and may supply water by measure either for domestic or other purposes and may if they think fit enter into agreements with respect to any such supply to any person and the moneys payable for the supply of water under this section shall be recoverable in the same manner as water rates: Provided always that no person shall be entitled to a supply of water for other than domestic purposes if such supply would interfere with the sufficiency of the supply of water for domestic purposes. 25. It shall be lawful for the corporation to enter into contracts with the owner of any tenement or hereditament situate in the neighbourhood of any water main or pipe of the corporation though not within the water limits and also with any local authority or company not within such water limits to take and use the water of the corporation upon such terms and conditions and for such period as may be agreed upon between them: Provided always that the corporation shall not supply water under any contract if and so long as their doing so would prevent them from giving throughout the water limits a sufficient supply for domestic purposes."

The facts of the case are not in dispute. Two resolutions of the corporation, passed in 1926 and 1935 respectively, provide that the water charges for motor

cars and tri-cars are to be 3s. for any quarter or less part of a year for which an excise licence is in force in respect of a car. The procedure which has been adopted to give effect to those resolutions is set out in an agreed statement. What the corporation do is to levy a water charge, in addition to the water rate or charge, if any, payable for the ordinary water supply for domestic purposes, on every person registered in Leeds as being the possessor of one or more motor cars (including tri-cars) in respect of which a road fund licence is in force, which person is referred to in the statement as the registered owner. They do this notwithstanding that the person charged has made no request for a supply of water for non-domestic purposes, and the process of levying such water charge is as follows. Early in each quarter a demand note is sent to each registered owner demanding payment in respect of that quarter of the total water charges claimed from that person whether for domestic or for non-domestic supplies. The demand note gives details of such charges, showing the separate items of which the total charge is composed, and as respects the motor cars of each such person it shows a charge of 3s. in respect of each motor car of which he is the registered owner. Attached to the agreed statement are examples of standard demand notes applicable in the case of (i) a person with a house and motor car in respect of which he is required to pay domestic and motor car water charges, (ii) a person with a house who is required to pay domestic charges but not a motor car charge, (iii) a person who is required to pay a motor car water charge but not a domestic water charge (*e.g.*, a lodger), (iv) a person who is required to pay a domestic water charge and two or more motor car charges.

It seems that, on the first occasion that the demand note is sent to a registered owner claiming a water charge in respect of a motor car, a printed slip is always attached thereto worded in the following manner: •

"A supply of water for any purposes in connection with a motor vehicle including a tri-car is not a domestic use. Therefore, where water from the Leeds Corporation supply is used for this purpose a charge of 3s. is payable for each quarter or less part of a year during which an excise licence is in force. The registered owner is liable whether the water is used by him or on his behalf (by a proprietor of a public garage or any other person) and wherever the vehicle is kept. An allowance will be made upon application in writing in respect of each complete quarter that a vehicle is not licensed."

If, on receipt of the demand note, the registered owner claims, and satisfies the corporation, that no water supplied by the corporation is or will be used by him or on his behalf for any purpose in connection with any motor vehicles registered in his name either at any public or private garage or at any address within the city's waterworks undertaking (area of supply), the corporation withdraw the charge. For this purpose the corporation treat water used at a public garage for the purpose of washing the registered owner's motor car as being used on his behalf, notwithstanding that the motor car is so washed by the proprietor or his servant by virtue of a contract with the registered owner and as an independent contractor, and, save in so far as he himself may be a registered owner, no charge is imposed on the proprietor of a public garage to whom water is supplied for use on motor vehicles unless such proprietor has elected to be provided with a metered supply. If a registered owner wishes to satisfy the corporation that no water is or will be used as aforesaid by or on his behalf, he is normally required to complete and sign a declaration in a certain printed form supplied to him if and when he claims exemption from the charge, and, unless the form is returned duly completed and signed by him (or, occasionally, when he otherwise satisfies the corporation that no water is or will be used as aforesaid),

the corporation refuse to withdraw their claim to the charge. If, on receipt of the demand note, the registered owner claims and satisfies the corporation that the only water supplied by them which is or will be used for any purposes in connection with his car is supplied by meter, and, therefore, separately paid for, the corporation withdraw the charge.

Thus, it appears that the corporation have levied these water charges indiscriminately on every person registered with them, in their capacity of local taxation authority, as being the possessor of a motor car in respect of which an excise licence is in force, although such person may neither have asked for, nor been furnished with, a supply of water for purposes other than domestic purposes. I am told that the number of such cars is about twenty thousand. So far as I understand, the only use that can be made of any appreciable quantity of water in connection with a motor car is for washing it, for the amount of water poured into the radiator of a car is, in my judgment, so small as to be negligible. It is to be noted that the charge made by the corporation in respect of a steam wagon which is not only washed but has water put into its boiler is 30s., and not 3s., per quarter. The corporation have, in fact, proceeded on the assumption that, if a car is registered as ordinarily kept at an address in Leeds, it follows, not necessarily but as a matter of strong probability, that it will be washed on one or more occasions in each quarter with the corporation's water and that the probability is so strong as to justify them in requiring its owner to sustain the burden of establishing the contrary. I do not like the principle of levying a charge on the citizens of Leeds and then requiring them to disprove, if they can, the propriety of it, nor do I like the use which is being made of the records in the possession of the corporation as the local taxation authority to enable them to enforce their claims as water undertakers, nor do I think that their efforts to avoid unfair and unjustified charges have been particularly adroit. I also dislike very much the favour accorded to public garages in which a vast quantity of water must be used for washing cars, not only cars registered in Leeds, but those belonging to visitors to the city of various kinds and remaining there for varying periods. I do not, however, think that the corporation have failed to do their best to avoid making improper and unjustified charges, but I also think there is no doubt that a ratepayer will often rather pay this small charge than challenge it, and that is a thing which is undesirable and ought not to be allowed to occur.

The corporation claim that their way is really the only way in which they can charge for water used for car washing, any alternative involving the employment of a large number of inspectors to see that the water is not being misused. But whether I like or dislike their methods, the sole question is whether the corporation are justified in what they are doing by the very wide and comprehensive terms of s. 24 of the special Act, which authorises them to supply water for other than domestic purposes on such terms and conditions as they think fit, having regard to the differences between the language of that section and the language of the other sections to which I have called attention. It is suggested that a supply of water pre-supposes and requires that there should be a recipient of the supply who can be identified and that the supply of water can only be given and charged for where the recipient of the supply is identified or identifiable, and it is pointed out that in a special Act of Parliament the powers must be construed somewhat strictly: see *Metropolitan Water Board v. New River Co. (1)*, per LORD MACNAGHTEN. The opposing argument is that water may be supplied for a particular purpose (in this case, car washing), if it is made

(1) (1904), 20 T.L.R. 687, 690.

available for that purpose to those who desire either to use it or to procure that it shall be used for that purpose, and that it matters not whether the water leaves the mains of the corporation and reaches the owner's car by the action or instrumentality of the owner himself, or by that of his agent, a contractor, or a friend, nor does the source from which it happens to emerge from the corporation's reservoirs or mains matter. It is, therefore, said that the payment of the 3s. each quarter makes the car, as it were, free of the corporation's water from whatsoever tap or standpipe or hydrant it may be drawn. Treating the citizens of Leeds as a sort of family party and the city of Leeds as a collection of taps, standpipes and hydrants, the arrangement may be regarded as giving permission to those members of the family who have paid the water charge to have their cars washed with the city's water. I think on the whole that this view of the section is right, and, while I also think that the procedure is not incapable of some improvement, I hold that this action fails and must be dismissed, the relators paying the costs.

Judgment for the defendants.

Solicitors: *Clifford-Turner & Co.* (for the Attorney-General); *Sharpe, Pritchard & Co.*, agents for *O. A. Radley*, town clerk, Leeds (for the corporation).

R.D.H.O.

PROBATE, DIVORCE AND ADMIRALTY DIVISION

(PEARCE, J., AND LORD MERRIMAN, P.)

Nov. 16, 23, 30, 1951

SHELLEY v. SHELLEY

Infant—Maintenance—Order of High Court—Enforcement—Summons by wife as infant's next friend—Debtors Act, 1869 (c. 62), s. 5—Matrimonial Causes Rules, 1950 (S.I., 1950, No. 1940), r. 64 (1).

Where a maintenance order directing payment by the husband to the children of the marriage is not complied with, a judgment summons under s. 5 of the Debtors Act, 1869, will not be issued in the name of the wife since she administers the money merely as agent for the children and on their behalf and is not herself a principal as against the debtor. The children are persons "in whose favour an order had been made" within the meaning of R.S.C., Ord. 42, r. 26, and, under the Matrimonial Causes Rules, 1950, r. 64 (1), the wife is entitled to issue the summons as their next friend.

CORAM PEARCE, J.

APPLICATION *ex parte* by a wife for leave to issue a judgment summons in her own name against the husband in respect of his failure to comply with an order for the payment of maintenance to two children of the marriage.

L. F. Sturge for the wife.

Cur. adv. vult.

Nov. 23. PEARCE, J., read the following judgment. In this case the wife petitioner wishes to issue a judgment summons in her name in respect of an order for payment of maintenance to two children of the marriage. For tax purposes the order was made in a form directing payment, not to the wife, but to the children. Such orders are not infrequent. Counsel for the wife relies on *Re Cox-Sinclair. Ex p. Jones* (1). In that case an order for costs was made in favour of the petitioner's solicitor. The solicitor issued a judgment summons

(1) [1913] W.N. 263.

in his own name. Objection was taken that the judgment summons should have been issued in the petitioner's name. PHILLIMORE, J., held that the objection was fatal, and dismissed the summons, but gave leave to issue a fresh summons. That judgment clearly implied that a judgment summons could have been issued by the petitioner. The basis of that decision was explained in *Re A Debtor* (No. 76 of 1929) (1) by LORD HANWORTH, M.R., where he said ([1929] 2 Ch. 152):

"The principle raised seems to me to have been the basis of the judgment of PHILLIMORE, J., in *Ex p. Jones* (2), where he pointed out that the right party had not been put forward as principal to initiate proceedings against the debtor. Also, in *Ex p. Muirhead. Re Muirhead* (3), I think that in the judgment of COCKBURN, C.J., there is the same intention to indicate that the person at whose suit proceedings are taken must be the principal, the person in whose interest those proceedings are necessary. In my opinion the petitioning husband in this case was the person who was really the principal, for whose indemnity legal proceedings were necessary. The solicitors were merely acting as a necessary part of the machinery, under which the sum enured for the benefit of the petitioner; but they were not the principals as against the debtor."

LORD HANWORTH, M.R., was there dealing with the question whether a solicitor who had an order for costs could come within the meaning of "a creditor" under the Bankruptcy Act, 1914, but his reasoning as to the principle underlying the brief report of the judgment in *Re Cox-Sinclair. Ex p. Jones* (2) is equally applicable to the case before me which comes under s. 5 of the Debtors Act, 1869.

That section regulates, so far as monetary orders are concerned, the old remedy by writ of attachment for contumacious refusal to carry out an order: see *Hewitson v. Sherwin* (4). The words of the section do not expressly state who is entitled to apply to enforce the order, nor say that only the recipient may do so, but the section is expressed to be subject to the prescribed rules. Rule 4 of the General Rules under the Debtors Act, 1869, made in Michaelmas Term, 1869, states that the order for committal "may be in the Form A in the schedule, or to the like effect." Form A is headed:

"Upon hearing, etc., [*Christian and surname of the debtor and of the party claiming*]."

It continues:

"I do order that the said A.B. be for default in payment of the debt hereinafter mentioned committed to prison . . . or until he shall pay £ . . . being the amount of [*an instalment due to the said C.D. upon*] [*or a judgment of the court of . . .*] [*or an order made by . . .*] . . ."

Rule 5 says that on payment of the sum mentioned in the order the debtor shall be entitled to a certificate of satisfaction in the Form B in the schedule or to the like effect signed by the attorney in the cause of the creditor or signed by the creditor. The jurisdiction and powers of the High Court under s. 5 of the Debtors Act, 1869, so far as they relate to default in payment in pursuance of any order or judgment made or given by a judge exercising jurisdiction in matrimonial causes, were assigned to the Divorce Division by the Debtors Act (Matrimonial Causes) Jurisdiction Order, 1932 (S.R. & O., 1932, No. 503).

(1) [1929] 2 Ch. 146.

(2) [1913] W.N. 263.

(3) (1876), 2 Ch.D. 22.

(4) (1870), L.R. 10 Eq. 53.

It is clear that the rules under the Debtors Act, 1869, anticipate that the application will be made by the party in whose favour the order is made, and, in my view, that was their intention. Moreover, from a practical point of view, if the wife were to issue this summons, there would be no one who could give the husband the valid certificate of satisfaction to which he is entitled under r. 5. *Re Cox-Sinclair*. *Ex p. Jones* (1), as explained by LORD HANWORTH, M.R., does not help the wife. There the petitioner was entitled to apply because, in the words of LORD HANWORTH, M.R., he was

"the person in whose interest those proceedings are necessary . . . the person who was really the principal, for whose indemnity legal proceedings were necessary,"

whereas the solicitors in whose favour the order was made

"were merely acting as a necessary part of the machinery, under which the sum enured for the benefit of the petitioner; but they were not the principals as against the debtor."

In the case before me it cannot be said that the wife is the principal and the children are acting as a necessary part of the machinery under which the sums enure for the benefit of the petitioner. The whole basis and object of an order directing payment of the money to the children direct is that the money should be their income and belong to them. It is only on that basis that a benefit is obtained in respect of tax. It may be that in practice the wife administers it for their benefit, but, if so, she does so only as agent for them and on their behalf. She has no legal right to touch the money. Although it would be preferable on technical and social grounds if the judgment summons in respect of this order could be issued by the wife rather than the children, I am bound regretfully to hold that it cannot. The application is, therefore, refused.

Application dismissed.

CORAM LORD MERRIMAN, P.

APPLICATION *ex parte* by the wife as next friend of the children of the marriage for leave to issue a summons against the husband in respect of the arrears of payments under the order for the maintenance of the children.

L. F. Sturge for the wife.

LORD MERRIMAN, P.: This is an *ex parte* application by a wife, who has obtained a decree absolute against her husband, for leave to issue, as next friend of the children of the marriage, a summons under s. 5 of the Debtors Act, 1869, against her former husband in respect of arrears of maintenance payable to them.

By r. 375 of the Bankruptcy Rules it is necessary to obtain the leave of a judge for the issue of the summons. The order in respect of which it is desired to proceed is an order made under what is now s. 26 (1) of the Matrimonial Causes Act, 1950, which reproduces s. 193 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, and provides:

"In any proceedings for divorce . . . the court may from time to time, either before or by or after the final decree, make such provision as appears just with respect to the custody, maintenance and education of the children [of the marriage] . . ."

By an order of Nov. 22, 1949, made at the instance of the wife Mr. Registrar LONG ordered maintenance for the wife at the token rate of 1s. per annum,

(1) [1913] W.N. 263.

payable monthly, and he ordered the husband to pay to each of the two children of the marriage the sum of £1 per week, payable weekly, until each child should attain the age of sixteen. It was also ordered that the wife and the husband should share the income tax relief in respect of the children. The order is often in this form to avoid the income payable under the order being included with other income which the wife may have. That is clearly shown on the face of the order by the provision for sharing the income tax relief. The order in this form has the disadvantage that difficulties may arise with regard to its enforcement where the husband makes default in payment. In the present case the wife applied to PEARCE, J., for leave to issue a summons, she herself being the applicant, and PEARCE, J., decided that she was not entitled to make the application. He took the view that the whole framework of the Debtors Act, 1869, and the rules under that Act made it clear that the person to make the application was the person who was entitled to the fruit of the judgment, namely, the children. The wife is now applying to be allowed to issue this summons as next friend of the two children in whose favour the order was made.

I know nothing about the merits of the case, but on the face of the summons there is a statement that a very considerable sum is due under the order to these two children. There is no doubt that arrears of maintenance are the proper subject of proceedings under s. 5 of the Debtors Act, 1869. Rule 61 of the Matrimonial Causes Rules, 1950, provides:

"An application for . . . committal shall be made to a judge . . ."

It does not, however, specify how, or by whom, it should be made. By r. 80, it is provided:

"Subject to the provisions of these rules and of any enactment, the Rules of the Supreme Court shall, notwithstanding the provisions of Ord. 68 thereof, apply with the necessary modifications to the practice and procedure in any cause or matter to which these rules apply."

Since neither the method of application nor the party to apply is defined in the Matrimonial Causes Rules, 1947, R.S.C., Ord. 42, r. 26, is brought into play. By that rule:

"Any person not being a party to a cause or matter, who obtains any order or in whose favour any order is made, shall be entitled to enforce obedience to such order by the same process as if he were a party to such cause or matter . . ."

I think those words are wide enough to cover the case of these two infants. They did not, it is true, obtain the order. The wife, being the petitioner, was the proper party to obtain the order, but plainly the children are persons in whose favour the order was made. Therefore, *prima facie*, they come within this rule, and it is clear from the footnote to the rule that the rule (and its predecessors) has been treated for many years as being applicable to orders made in this Division in connection with maintenance.

There remains the question: How are these children, being persons in whose favour this order has been made, to make the application? Here the Matrimonial Causes Rules, 1950, are quite clear, for by r. 64 (1) of those rules, relating to proceedings by infants and persons of unsound mind, it is provided:

"An infant . . . may . . . make any application to which these rules apply by his next friend . . ."

Plainly this is an application to which these rules apply, and it is suggested

that the wife, as mother of the children, is the right person to be the next friend. By r. 64 (2) it is provided:

"Before the name of any person is used in any proceedings as next friend the solicitor for the infant . . . shall obtain a written authority signed by that person. The authority shall be attested by a solicitor, who shall certify that the proposed next friend has no interest in the proceedings adverse to that of the infant . . ."

The position at this moment is that the wife has signed an agreement to act and has stated that she has no adverse interest to the children. *Prima facie*, it is plain that not only has she no adverse interest, but that she has a favourable interest because the enforcement of this order manifestly is very much in her interest as well as in that of the children. Subject, therefore, to this authority being attested by the solicitor, I make the order that the wife be allowed to issue the summons as next friend on behalf of the two infants.

Order for leave to issue summons.

Solicitors: *May, May & Deacon* (for the wife).

G.F.L.B.

COURT OF CRIMINAL APPEAL

(LORD GODDARD, C.J., HILBERY AND BARRY, JJ.)

Dec. 10, 1951

REX v. HALL

Criminal Law—Procedure—Separate trials—Evidence on all counts admissible on each count—Gross indecency—Similar acts committed in similar circumstances.

The appellant was convicted on eight counts of an indictment charging him with committing acts of gross indecency with three different men, B, C, and R. The judge at the trial refused an application for the separate trial of each group of counts relating to each man on the ground that all the witnesses to be called could be called on any one count. The defence of the appellant with regard to B and C was that the acts complained of were done in the course of the administration of medical treatment, and with regard to R that he had never met him.

HELD: (i) that, as soon as it became clear that the defence of the appellant was accident or mistake or that the facts alleged by the prosecution had an innocent, and not a guilty, complexion, the prosecution became entitled to call evidence of similar acts, and such evidence was none the less admissible because it showed, or tended to show, that the appellant was guilty of another offence. The evidence relating to B was, therefore, admissible on any count relating to C, and *vice versa*.

Dictum of the Court of Criminal Appeal in *Rez v. Sims* ([1946] 1 All E.R. 697, 701), that such evidence was admissible in a case of this kind irrespective of the issues raised by the defence, not followed, but decision otherwise held to be good law.

(ii) that on any count relating to R the evidence of B and C was admissible on the issue of identity, and *vice versa*. *Thompson v. Director of Public Prosecutions* (1918) (82 J.P. 145).

(iii) that the evidence of each of the three men was, therefore, admissible on the trial of the counts relating to the others, and the judge had properly exercised his discretion in refusing to order separate trials.

APPEAL against conviction.

The appellant was convicted at the Central Criminal Court before LYNSEY, J., on eight counts of an indictment, all of which charged him with gross indecency

with male persons. Three young men—B, C, and R—were involved. An application was made to LYNSEY, J., to order separate trials of each group of counts relating to each man, but the judge ordered that all the counts should be tried together, giving as his reason that all the evidence to be called on all the counts could have been called on any one of the counts. It appeared that the appellant's defence with regard to B and C was that the acts alleged to be indecent were done by him to them in the course of medical treatment, and with regard to R that he had never met him. The appellant was not a medical man, but was a member of a society concerned with the study of the occult. It was not disputed that he had met B and C at this society, and each of them said that he had made indecent suggestions to them and had supplied them with a particular ointment and then committed the acts alleged. R said that he had met the appellant after the appellant had been giving a scientific or pseudo-scientific lecture, that the appellant had talked indecently to him, and had handed him a box of the same kind of ointment before committing the acts alleged.

E. V. Falk for the appellant.

R. E. Seaton for the Crown.

LORD GODDARD, C.J., delivered the following judgment of the court. The appellant was convicted before LYNSEY, J., at the Central Criminal Court on eight counts of an indictment containing ten counts. The charge in each count was gross indecency, three different young men being involved. Charges relating to one young man were contained in counts 1, 2, and 4; charges relating to the second young man were contained in counts 3, 5, 7, and 8; while the charge relating to the third man, one Ritchie, was in count 6. On counts 9 and 10, which related to a fourth man, the appellant was acquitted. At the outset of the case an application was made to the judge asking him to order separate trials of the groups of counts relating to each young man.

That the indictment was good in form and complied with s. 4 of the Indictments Act, 1915, there can be no doubt. Rule 3, which is contained in sched. I to the Act, provides:

"Charges for any offences, whether felonies or misdemeanours, may be joined in the same indictment if those charges are founded on the same facts, or form or are a part of a series of offences of the same or a similar character."

There is no doubt in the present case that the facts on which the charges were founded were of a startlingly similar character.

That being so, it became a matter of discretion in the judge whether he would allow the charges to be tried together or whether he would order separate trials. That is a judicial discretion with the exercise of which this court has said on more than one occasion it will not interfere unless it is compelled by some overwhelming fact. If the judge, or recorder, or chairman of quarter sessions, has given a reason which is obviously a bad reason, the court may review its decision, although it is not certain that it would if it were of opinion that in all the circumstances the charges might well have been tried together though the reason given by the judge was wrong. In the present case LYNSEY, J., gave as his reason that he was of opinion that all the witnesses who were to be called on all the counts could have been called on any one of the counts. That was because the judge had seen from the conduct of the case when it was before the examining magistrate what was the nature of the defence.

The appellant, who was masquerading as a medical man, was attached to some sort of society or institution which, it was suggested, was concerned

inter alia, with the occult. Young men used to go to this institution. In the case of one young man, the moment he got there the appellant began to talk to him about homosexual matters and to behave with him in a disgusting way. Another young man alleged that as soon as he visited this society the appellant began to talk to him about homosexuality and to behave indecently. Later he invited him to his home where indecent acts took place. In the third case the appellant met a young man at Bournemouth and did exactly the same thing to him as he had done with the other two young men. When the appellant was charged he said that he had never seen this young man before.

It is said that the provisions in the Indictments Act, 1915, and the rules thereunder by which charges can be included in one indictment and tried together are always subject to the principle that, if the evidence on one count is not admissible on the other counts and is of a highly prejudicial character, the judge ought to refuse to try all the counts together and should try them one by one. Counsel for the appellant desired to challenge the ruling in *Rex v. Sims* (1) in which this court, consisting of five judges, decided that certain counts could all be tried together. That case also was concerned with homosexual offences. In that case there were several young farm labourers with whom the prisoner, an elderly man, was alleged to have committed the offence of buggery. The court, in effect, said that it was right of the judge to try all the four cases together, because all the men, who admittedly had gone to the prisoner's house to spend the evening on different occasions, said that exactly the same advances had been made to them by the prisoner and exactly the same acts had been committed on them, which tended to show that the association of the prisoner with these men was a guilty and not an innocent one. His defence was that he used to invite these men to have a game of cards and sit with him in his cottage. The answer the prosecution made was: "Although you say A.B. came to you innocently, whereas he says you committed these filthy offences on him, exactly the same thing happened in the case of C.D., who you say came innocently, and also in the case of E.F." On those grounds the court held that the evidence was admissible. In the course of the judgment two lines of approach were suggested, and I think it should be taken, in view of a criticism by the Privy Council in *Noor Mohamed v. Rex* (2)—criticism, be it noted, not of the decision, but of a passage in the judgment—that that judgment went too far. Giving the judgment of the court, I said:

"It has often been said that the admissibility of evidence of this kind depends on the nature of the defence raised by the accused: see, for instance, the observations of LORD SUMNER in *Thompson v. Director of Public Prosecutions* (3), and of this court in *Rex v. Cole* (4). We think that that view is the result of a different approach to the subject. If one starts with the assumption that all evidence tending to show a disposition towards a particular crime must be excluded unless justified, then the justification of evidence of this kind is that it tends to rebut a defence otherwise open to the accused; but if one starts with the general proposition that all evidence that is logically probative is admissible unless excluded, then evidence of this kind does not have to seek a justification but is admissible irrespective of the issues raised by the defence, and this we think is the correct view."

Their Lordships in the Judicial Committee doubted the correctness of the second

(1) [1946] 1 All E.R. 697; [1946] K.B. 531.

(2) [1949] 1 All E.R. 365; [1949] A.C. 182.

(3) 82 J.P. 145, 148; [1918] A.C. 221, 232.

(4) (1941), 105 J.P. 279.

proposition contained in that passage, but they thought that the first proposition was correct. Therefore, this matter may be viewed on the footing: "If one starts with the assumption that all evidence tending to show a disposition towards a particular crime must be excluded unless justified, then the justification of evidence of this kind is that it tends to rebut a defence otherwise open to the accused." One objection taken in the present case is that that would be tantamount to saying that in every case where the prisoner pleads Not Guilty the evidence must be open. I do not think that is right, and LORD SUMNER in *Thompson v. Director of Public Prosecutions* (1) said it was not. In criminal cases, with certain immaterial exceptions, the prisoner does not plead in writing. He pleads orally, and a plea of Not Guilty is a plea to the general issue. As soon as the general issue is pleaded all defences are open. It would not, therefore, be right at once in all cases to assume that a prisoner is going to set up a certain defence, but he may have shown perfectly clearly, by what he has said at the time of arrest or by the conduct of his case before the justices, the defence which he is going to raise. It may be that some particular defence does not emerge until some cross-examination takes place in the court of trial, from which it can be seen that the prisoner is going to set up the defence of mistake or accident, or, as in the present case, innocent conduct. As soon as it becomes clear that the prisoner's defence is that the facts alleged by the prosecution have an innocent, and not a guilty, complexion, evidence may be given which otherwise might be inadmissible, and it is not the less admissible because it shows, or tends to show, that the prisoner has been guilty of another offence. That was made clear in *Thompson v. Director of Public Prosecutions* (1).

In the present case LYNSEY, J., pointed out to the jury that if the appellant was genuinely doing the acts in question with a view to giving medical advice, even if he was not a qualified medical man, that would be a defence, because he would not be doing them with an indecent mind and they would cease to be indecent acts. Therefore, in my opinion, this matter was dealt with in a proper way. The reasons given by LYNSEY, J., were right and the evidence was clearly admissible. When one witness gave evidence of the suggestion made to him about medical treatment, it was material to show that the intention of the appellant was indecent and that he was doing almost the same thing in the case of another witness.

The only count which for a moment gave the court concern was that charging offences against the man whom the appellant met at Bournemouth, because there the appellant's defence was: "I had never seen this man before in my life." But there the evidence of the other men became material on the very ground on which the House of Lords upheld the admission of evidence in *Thompson v. Director of Public Prosecutions* (1), because it went to identity. The expression "identity" means that the evidence goes to show that the witness for the prosecution is speaking the truth when he says: "That is the man who did these indecent things to me," and the evidence of the other men shows that the prisoner is a man addicted to unnatural practices. It was open to the jury to say that Ritchie was a liar, but they were surely entitled to take into account the evidence which the other two young men had given, because Ritchie told the jury that the appellant had talked to him in exactly the same way as he did to the other men. That tended to show that the appellant was the man who Ritchie said performed disgusting acts on him. I cannot see that it makes any difference that in *Thompson v. Director of Public Prosecutions* (1) the defence was an *alibi*. That simply means: "I am not the man. It was

(1) 82 J.P. 145, 148; [1918] A.C. 221, 232.

somebody else who committed the offence." Whereas the appellant says, without saying that he was not there: "I have never seen the man before in my life." That was a flat denial that he was engaged in these practices and whether it was because he was not in the town or because, being in the town, he had never seen the man, seems to me not to matter in the least. He was giving the same denial to Ritchie's evidence as was given in *Thompson v. Director of Public Prosecutions* (1), and the House of Lords held that the evidence was admissible on the grounds which I have indicated.

In future it would be desirable that a court which has to deal with a case of this kind should remember that the criticism which was passed on *Rez v. Sims* (2) was passed on one passage only in a long judgment, and remember that no court has yet thrown any doubt on this passage in that case, which, I think, sums up the matter (3):

"In this case the matter can be put in another and very simple way; the visits of the men to the prisoner's house were either for a guilty or innocent purpose; that they all speak to the commission of the same class of acts upon them tends to show that in each case the visits were for the former and not the latter purpose. The same considerations would apply to a case where a man is charged with a series of indecent offences against children, whether boys or girls; that they all complain of the same sort of conduct shows that the interest the prisoner was taking in them was not of a paternal or friendly nature but for the purpose of satisfying lust."

To the words "paternal or friendly nature" one could add "or medical nature."

Appeal dismissed.

Solicitors: *Pollard, Stallabrass & George Martin* (for the appellant); *Director of Public Prosecutions* (for the Crown).

T.R.F.B.

- (1) 82 J.P. 145, 148; [1918] A.C. 221, 232.
 (2) [1946] 1 All E.R. 697; [1946] K.B. 531.
 (3) [1946] 1 All E.R. 701; [1946] K.B. 548.

COURT OF CRIMINAL APPEAL

(LORD GODDARD, C.J., HILBERY AND BARRY, JJ.)

Dec. 11, 1951

REX v. BURROWS

Criminal Law—Gross indecency—Boy invited to handle prisoner indecently—Criminal Law Amendment Act, 1885 (48 and 49 Vict., c. 69), s. 11.

The appellant was convicted of indecent assault on a boy whose evidence was that the appellant exposed himself and asked the boy to masturbate him and also attempted to touch the boy's private parts. The recorder directed the jury that either of the acts alleged by the boy would constitute the offence charged.

HELD: (i) that the former act could not amount to an indecent assault, because there had been no threat or hostile act by the appellant towards the boy, and, consequently, no assault, and that, the direction in law having been wrong in that respect, the conviction must be quashed.

Fairclough v. Whipp (1951) (115 J.P. 612), followed.

(ii) that in such circumstances the proper charge was attempting to procure an act of gross indecency with the prisoner.

APPEAL against conviction.

The appellant was convicted at Ipswich Borough Quarter Sessions of indecent assault on a boy. The evidence of the boy was that the appellant exposed himself and asked the boy to masturbate him. The boy also said that the appellant made an attempt to touch his (the boy's) private parts. The recorder directed the jury that the question for them was whether the appellant had done either of the things which the boy alleged as either of those acts would constitute the offence charged.

W. H. Hughes for the appellant.

Jellinek for the Crown.

The judgment of the court was delivered by:

LORD GODDARD, C.J.: The Divisional Court has held in *Fairclough v. Whipp* (1) that an invitation to a child to touch a person indecently cannot be an indecent assault because there is no hostile act towards the child, and, unless there is a hostile act, there cannot be an assault. The appellant ought to have been charged with attempting to procure an act of gross indecency with the boy. If he had been so charged he would, no doubt, have been, very properly, convicted. We have already, in the Court of Criminal Appeal, exploded the view that one person cannot be charged with an act of gross indecency if the other cannot be charged: *Rex v. Pearce* (2). The appellant was, however, charged with indecent assault, and, the learned recorder not having the advantage at the time of the decision in *Fairclough v. Whipp* (1), gave the jury a direction which, in view of that decision, was not a proper one. The court feels obliged to quash this conviction, but the case may be of some use if prosecuting authorities are made aware that in a matter of this description, where the prisoner and a boy are concerned, the prisoner should be charged with procuring or attempting to procure (as the case may be) an act of gross indecency and not with indecent assault. *Conviction quashed.*

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *Gotelee & Goldsmith, Ipswich* (for the Crown).

T.R.F.B.

(1) 115 J.P. 612; [1951] 2 All E.R. 834.

(2) 115 J.P. 157; [1951] 1 All E.R. 493.

certiorari. Thus it appears to me that in a case such as the one before this court *certiorari* will lie if there be error on the face of the proceedings. The Attorney-General, in submitting the contrary, relied on the decision of the Court of Appeal in *Racecourse Betting Control Board v. Secretary of State for Air* (1). Unfortunately, neither the *Nat Bell* case (2) nor the *Walsall* case (3), was cited when the *Racecourse Betting Control Board* case (1) was before the court. The reasons given for the decision appear to me to be in conflict with the views of EARL CAIRNS, L.C., and LORD PENZANCE in the *Walsall* case (3) and of LORD SUMNER in the *Nat Bell* case (2), though it may be that the judgment could have been affirmed on other grounds. The decision of the tribunal was a "speaking order" in the sense in which that term has been used. The court is entitled to examine it, and if there be error on the face of it, to quash it—

" . . . not to substitute another order in its place, but to remove that order out of the way, as one which should not be used to the detriment of any of the subjects of Her Majesty,"

as LORD CAIRNS said in the *Walsall* case (3).

[HIS LORDSHIP then dealt with the second submission of the Attorney-General that in fact no error appeared on the record of the decision of the tribunal. He came to the conclusion that error did appear, but in any event he considered that the point was not open to the tribunal, in view of the fact that the tribunal had admitted the error before the Divisional Court.]

The appeal fails. If it had succeeded, the applicant would have been deprived of some part of the compensation for loss of office to which he is entitled under the regulations, and to which everyone now agrees that he is entitled.

There was no way other than this by which the mistake could be rectified. The Attorney-General pointed out the undesirability of the court interfering with the decisions of tribunals set up by Parliament. I agree with him that the Divisional Court cannot extend its powers. It can only act according to the well-recognised rules. It is equally important that the court should not hesitate to act to prevent an injustice being done if the remedy sought is within the scope of its powers. Much time has been expended in recent years in considering whether in particular circumstances *certiorari*, or prohibition, will lie. A great deal of it could be saved. The regulations under the National Health Service Act, 1946, are of great complexity. The interpretation of them is left to the tribunal; there is no provision for an appeal to the courts. That position arises frequently nowadays. I most earnestly wish that in such cases, where difficult questions of law, and of interpretation, must arise, that there should be given some right of appeal. Perhaps the most convenient form is that adopted in s. 37 of the National Insurance (Industrial Injuries) Act, 1946, under which any question of law arising in connection with the determination of certain questions may, if the Minister thinks fit, be referred to the decision of the High Court, and any person aggrieved by the decision of the Minister on any question of law not so referred may appeal from that decision to the High Court. And there is provision in sub-s. (5) that the decision of the High Court shall be final, a provision which may be thought desirable in such cases. After all, it is the function of the courts to determine questions of law. Tribunals are sometimes given an unduly difficult task. There must be a feeling of dissatisfaction if it is recognised that a decision of a tribunal is wrong in law and yet there is no power to correct it—in other words, if there is no right to obtain the opinion of the

(1) [1944] 1 All E.R. 60; [1944] Ch. 114.

(2) [1922] 2 A.C. 128.

(3) (1878), 43 J.P. 108; 4 App. Cas. 30.

court. I am satisfied that the course I have suggested would result in a saving of time, and of expense, and would be for the public good.

DENNING, L.J.: The question in this case is whether the Court of King's Bench can intervene to correct the decision of a statutory tribunal which is erroneous in point of law. No one has ever doubted that the Court of King's Bench can intervene to prevent a statutory tribunal from exceeding the jurisdiction which Parliament has conferred on it, but it is quite another thing to say that the King's Bench can intervene when a tribunal makes a mistake of law. A tribunal may often decide a point of law wrongly while keeping well within its jurisdiction. If it does so, can the King's Bench intervene? There is a formidable argument against any intervention on the part of the King's Bench at all. The statutory tribunals, like the one in question here, are often made the judges both of fact and law, with no appeal to the High Court. If, then, the King's Bench should interfere when a tribunal makes a mistake of law, the King's Bench may well be said to be exceeding its own jurisdiction. It would be usurping to itself an appellate jurisdiction which has not been given to it. The answer to this argument, however, is that the Court of King's Bench has an inherent jurisdiction to control all inferior tribunals, not in an appellate capacity, but in a supervisory capacity. This control extends not only to seeing that the inferior tribunals keep within their jurisdiction, but also to seeing that they observe the law. The control is exercised by means of a power to quash any determination by the tribunal which, on the face of it, offends against the law. The King's Bench does not substitute its own views for those of the tribunal, as a court of appeal would do. It leaves it to the tribunal to hear the case again, and in a proper case may command it to do so. When the King's Bench exercises its control over tribunals in this way, it is not usurping a jurisdiction which does not belong to it. It is only exercising a jurisdiction which it has always had.

The origin of this controlling power was the writ of *certiorari* by which the King commanded the judges of any inferior court of record to certify the record of any matter in their court with all things touching the same and to send it to the King's court to be examined. The wording of the writ was for many centuries as follows, being originally in Latin and afterwards in English:

"We being willing for certain reasons that all and singular orders made by you (as is said) be sent by you before us, do command that you do send forthwith before us all and singular the said orders with all things touching the same; as fully and perfectly as they have been made by you and now remain in your custody or power, together with this our writ, that we may cause further to be done thereon what of right and according to the law and custom of England we shall see fit to be done."

I would pause for a moment to notice the amplitude of this writ. The record of the inferior court is to be sent up so that the King's Bench may cause to be done thereon "what of right and according to the law and custom of England" ought to be done. The width of these words is only matched by the width of the words used by the great masters of the law in speaking of *certiorari*. Thus JOSEPH CHITTY, in his book on GENERAL PRACTICE, 3rd ed., vol. II, p. 353a, said:

"As an essential mode of exercising a control over all inferior courts, [the Court of Queen's Bench] has a most extensive power to bring before it their proceedings, and fully to inform itself upon every subject essential to decide upon the propriety of the proceedings below. This is effected by a writ called *certiorari* . . . The writ issues in civil as well as criminal

cases. Thus, such a writ was ordered to be issued to the judge of an inferior jurisdiction, to return and certify the practice of his court [see *Williams v. Lord Bagot* (1)]."

Ninety years later LORD SUMNER used words of equal width in *Rex v. Nat Bell Liquors, Ltd.* (2) ([1922] 2 A.C. 156). The supervision by *certiorari*

"... goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise."

Of recent years the scope of *certiorari* seems to have been somewhat forgotten. It has not been supposed to be confined to the correction of excess of jurisdiction, and not to extend to the correction of errors of law, and several learned judges have said as much. But the Lord Chief Justice has, in the present case, restored *certiorari* to its rightful position and shown that it can be used to correct errors of law which appear on the face of the record, even though they do not go to jurisdiction. I have looked into the history of the matter, and find that the old cases fully support all that the Lord Chief Justice says. Until about one hundred years ago, *certiorari* was regularly used to correct errors of law on the face of the record. It is only within the last century that it has fallen into disuse, and that is only because there has, until recently, been little occasion for its exercise. Now, with the advent of many new tribunals and the plain need for supervision over them, recourse must once again be had to this well-tried means of control. I will endeavour to show how the writ of *certiorari* was used in former times, so that we can take advantage of the experience of the past to help us in the problems of the present.

Let me start with convictions by magistrates in summary proceedings under Acts of Parliament. Ever since the days of LORD HOLT, C.J., the Court of King's Bench has been extremely strict to see that all was in order. Everything necessary to support the conviction had to appear on the face of the record. The conviction had to recite the information in its precise terms. It had to set out the evidence of each witness as nearly as possible in his actual words. It had to state the adjudication with complete certainty. It had to show that the case was brought within the terms of the Act of Parliament creating the offence. If there was any defect in point of form, or any error in point of law, appearing on the face of the record, the conviction would be moved into the King's Bench by *certiorari* and quashed. Nothing could be supplied by argument or intendment. The principles on which the court acted will be found well stated by LORD HOLT, C.J., in *Rex v. Chandler* (3), and by BAYLEY, J., and HOLROYD, J., in *Rex v. Daman* (4). An entertaining illustration will be found in *Reg. v. Burnaby* (5) and specimen convictions in CHITTY'S GENERAL PRACTICE OF THE LAW, vol. II, p. 198, and in *Rex v. March* (6), where the conviction was drawn up by counsel on both sides so as to raise the point of law. The result of all this strictness, however, was that many convictions were quashed for defects of form and not of substance. The legislature, therefore, intervened in 1848 to make the record of a conviction much more simple. Instead of a detailed speaking record, there was provided an unspoken common form which rarely disclosed any error. Thenceforward

(1) (1824), 4 Dow. & Ry. K.B. 315.

(2) [1922] 2 A.C. 128.

(3) (1702), 1 Ld. Raym. 581; 1 Salk. 377; 91 E.R. 1288.

(4) (1819), 1 Chit. 147.

(5) (1703), 1 Com. 131 (92 E.R. 998); 3 Salk. 217 (91 E.R. 786); *sub nom. Reg. v. Burnaby*, (1704), 1 Salk. 181 (91 E.R. 166).

(6) (1824), 4 Dow. & Ry. K.B. 260.

there was not so much room for *certiorari* in the case of convictions, but the fundamental principles remained untouched: see *Rex v. Nat Bell Liquors, Ltd.* (1), per LORD SUMNER.

Next I will turn to the orders of justices in civil matters. The Court of King's Bench was never so strict about these as it was about convictions. It did not require a detailed speaking record to be sent up to them. The record had to contain everything necessary to show that the justices had jurisdiction to deal with the matter, and it had to set out their adjudication, but it was not necessary to set out either the evidence or the reasons. If a point of law arose, however, on which either party desired the ruling of the King's Bench, he could ask the justices to make a speaking order, that is, to make a special entry on the record of the reasons for their judgment. The justices were not bound to do this, but they usually did so if they entertained a doubt about the point. When their reasons thus appeared on the record, the Court of King's Bench would on *certiorari* inquire into their correctness, and if the reasons were wrong, would quash the decision. Sometimes the justices would find the facts and state them specially as part of the record so as to enable the Court of King's Bench to say whether their judgment on those facts was in law right or wrong. It was then known as a Case Stated, and the King's Bench would again on *certiorari* determine whether the decision was correct or not. The principles on which the court acted will be found well-stated by LORD HOLT, C.J., in *Rex v. Inhabitants of Audly* (2) and *Ricclip Parish v. Henden Parish* (3), and in the argument before ABBOTT, C.J., and his colleagues in *Rex v. Devon JJ.* (4), and by LORD CAIRNS in *Walsall Overseers v. London & North Western Ry. Co.* (5). Interesting illustrations will be found in *Rex v. Dobbyn* (6), *Reg. v. London* (7), *Ditton's Case* (8), and *Talbury (Inhabitants) v. Foston (Inhabitants)* (9). The procedure in these cases was, however, simplified in 1857 when the legislature intervened to enable justices to state a Case for the opinion of the court without the record being removed by a writ of *certiorari*: see s. 10 of the Summary Jurisdiction Act, 1857. Thenceforward there was not so much room for *certiorari* in the case of orders of justices, but again the fundamental principles remained untouched.

So far, I have considered only the convictions or orders of justices, which were by far the most numerous cases in which *certiorari* was used. I now come to the orders of statutory tribunals. The Court of King's Bench has from very early times exercised control over the orders of statutory tribunals, just as it has done over the orders of justices. The earliest instances that I have found are the orders of the commissioners of sewers, who were set up by statute in 1531 to see to the repairs of sea walls and so forth. The Court of King's Bench used on *certiorari* to quash the orders of the commissioners for errors on the face of them, such as when they failed to set out the facts necessary to show that they had jurisdiction in the matter, or when they contained some error in point of law. It is recorded that on one celebrated occasion the commissioners refused to obey a *certiorari* issued out of the King's Bench, and for this the whole body of them were "laid by the heels." The control thus exercised over the commissioners of sewers was used by LORD HOLT, C.J., as a precedent to control by *certiorari* the orders

(1) [1922] 2 A.C. 128.

(2) (1700), 2 Salk. 526.

(3) (1698), 5 Mod. Rep. 416; 87 E.R. 739.

(4) (1819), 1 Chit. 34.

(5) (1878), 43 J.P. 108; 4 App. Cas. 30.

(6) (1696), 2 Salk. 474; 91 E.R. 408.

(7) (1703), 3 Salk. 261; 91 E.R. 814.

(8) (1701), 2 Salk. 490; 91 E.R. 421.

(9) (1696), 2 Salk. 475; 91 E.R. 409.

of any tribunal set up by Parliament, such as the College of Physicians and the commissioners for the repair of Cardiff bridge. Since that time it has never been doubted that *certiorari* will lie to any statutory tribunal. It was suggested before us on behalf of the tribunal that, in the case of these statutory tribunals, the Court of King's Bench only interfered by *certiorari* to keep them within their jurisdiction, and not to correct their errors of law. There are, however, many cases in the books where *certiorari* was used to correct errors of law on the face of the record. A striking instance was where the commissioners of sewers imposed an excessive fine, and it was quashed by the Court of King's Bench on the ground that in law their fines ought to be reasonable. Other instances are the numerous cases where *certiorari* was used to determine the validity of a sewer's rate imposed by the commissioners of sewers. There are several cases where an auditor's certificate has been quashed for error of law on the face of it. And I have no doubt that many more instances could be found throughout the books. The principles on which the court acted in the case of the commissioners of sewers will be found set out in *Commins v. Massam* (1), CALLIS ON SEWERS, 4th ed. (1824), pp. 203 and 204, and 342 to 344, and CHITTY'S GENERAL PRACTICE OF THE LAW, vol. II, at p. 379. The decisions of LORD HOLT are reported in *Grenville v. College of Physicians* (2), and the *Cardiffe Bridge Case* (3). A case of an auditor's certificate is *Reg. v. White* (4).

Leaving now the statutory tribunals, I turn to the awards of arbitrators. The Court of King's Bench never interfered by *certiorari* with the award of an arbitrator, because it was a private tribunal and not subject to the prerogative writs. If the award was not made a rule of court, the only course available to an aggrieved party was to resist an action on the award or to file a bill in equity. If the award was made a rule of court, a motion could be made to the court to set it aside for misconduct of the arbitrator on the ground that it was procured by corruption or other undue means: see the statute 9 and 10 Will. III, c. 15. At one time an award could not be upset on the ground of error of law by the arbitrator because that could not be said to be misconduct or undue means, but ultimately it was held in *Kent v. Elstob* (5) that an award could be set aside for error of law on the face of it. This was regretted by WILLIAMS, J., in *Hodgkinson v. Fernie* (6), but is now well established. This remedy by motion to set aside is, however, confined to arbitrators. It does not extend to statutory tribunals: see *Racecourse Betting Control Board v. Secretary of State for Air* (7). I look on that decision as merely a decision as to the scope of the remedy of setting aside on motion. It is not a decision on substantive law. It does not take away or diminish the inherent jurisdiction of the Court of King's Bench to interfere by *certiorari*.

It will have been seen that throughout all the cases there is one governing rule—*certiorari* is only available to quash a decision for error of law if the error appears on the face of the record. What, then, is the record? It has been said to consist of all those documents which are kept by the tribunal for a permanent memorial and testimony of their proceedings: see BLACKSTONE'S COMMENTARIES.

(1) (1666), March. N.R. 196; 82 E.R. 473.

(2) (1700), 12 Mod. Rep. 386 (88 E.R. 1398); *sub nom. Groenvelt v. Burnell*, Carth. 491 (90 E.R. 883); Holt, K.B. 184 (90 E.R. 1000); Holt, K.B. 536 (90 E.R. 1195); 1 Com. 76 (92 E.R. 967); 1 Salk. 144 (91 E.R. 134).

(3) (1700), 1 Salk. 146; 91 E.R. 135; *sub nom. Rex v. Glamorganshire (Inhabitants)*, 12 Mod. Rep. 403; 88 E.R. 1409.

(4) (1883), 11 Q.B.D. 309; *reusd. C.A.* (1884); 49 J.P. 294; 14 Q.B.D. 358.

(5) (1802), 3 East. 18; 102 E.R. 502.

(6) (1857), 3 C.B.N.S. 189.

(7) [1944] 1 All E.R. 60; [1944] Ch. 114.

vol. III, p. 24. But it must be noted that, whenever there was any question as to what should, or should not, be included in the record of any tribunal, the Court of King's Bench used to determine it. It did it in this way. When the tribunal sent their record to the King's Bench in answer to the writ of *certiorari*, this return was examined, and, if it was defective or incomplete, it was quashed: see *Apsley's Case* (1), *Rex v. Levermore* (2), and *Ashley's Case* (3). Alternatively, the tribunal might be ordered to complete it: *Williams v. Lord Bagot* (4) and *Rex v. Warnford* (5). It appears that the Court of King's Bench always insisted that the record should contain, or recite, the document or information which initiated the proceedings and thus gave the tribunal its jurisdiction and also the document which contained their adjudication. Thus in the old days the record sent up by the justices had, in the case of a conviction, to recite the information in its precise terms, and in the case of an order which had been decided by quarter sessions by way of appeal, the record had to set out the order appealed from: see *Anon.* (6). The record had also to set out the adjudication, but it was never necessary to set out the reasons: see *South Cadbury (Inhabitants) v. Braddon, Somerset (Inhabitants)* (7), nor the evidence, save in the case of convictions. Following these cases, I think the record must contain at least the document which initiates the proceedings, the pleadings, if any, and the adjudication, but not the evidence, nor the reasons, unless the tribunal chooses to incorporate them. If the tribunal does state its reasons, and those reasons are wrong in law, *certiorari* lies to quash the decision.

The next question which arises is whether affidavit evidence is admissible on an application for *certiorari*. When *certiorari* is granted on the ground of want of jurisdiction, or bias, or fraud, affidavit evidence is not only admissible, but it is, as a rule, necessary. When it is granted on the ground of error of law on the face of the record, affidavit evidence is not, as a rule, admissible, for the simple reason that the error must appear on the record itself: see *Rex v. Nat Bell Liquors, Ltd.* (8). Affidavits were, however, always admissible to show that the record was incomplete, as for instance, that a conviction omitted the evidence of one of the witnesses: see CHITTY'S GENERAL PRACTICE OF THE LAW, vol. II, p. 222, note (d), or did not set out the fact that the justices had refused to hear a competent witness for the defence: see *Rex v. Anon.* (9), whereupon the court would either order the record to be completed, or it might quash the conviction at once.

Notwithstanding the strictness of the rule that the error of law must appear on the face of the record, the parties could always by agreement overcome this difficulty. If they both desired a ruling of the Court of King's Bench on a point of law which had been decided by the tribunal, but which had not been entered on the record, the parties could agree that the question should be argued and determined as if it were expressed in the order. The first case I have found in which this was done was in 1792, *Rex v. Essex (Inhabitants)* (10), but thereafter it was quite common. It became a regular practice for parties to supplement the record by affidavits disclosing the points of law that had been decided by the tribunal. This course was only taken if no one objected. It seems to have been

(1) (1671), Sty. 85; 82 E.R. 549.

(2) (1700), 1 Salk. 146; 91 E.R. 135.

(3) (1697), 2 Salk. 479; 91 E.R. 412.

(4) (1824), 4 Dow. & Ry. K.B. 315.

(5) (1825), 5 Dow. & Ry. K.B. 489.

(6) (1697), 2 Salk. 479; 91 E.R. 412.

(7) (1710), 2 Salk. 607; 91 E.R. 515.

(8) [1922] 2 A.C. 128.

(9) (1816), 2 Chit. 137.

(10) (1792), 4 Term Rep. 591; 100 E.R. 1193.

adopted by litigants as a convenient alternative to asking the tribunal to make a speaking order. Thus, in the numerous cases on the validity of a sewer's rate it was the regular course of proceeding for affidavits to be lodged stating the objections in law to the rate, and the case was decided on the objections stated in the affidavits: see, for instance, *Reg. v. Tower Hamlets Sewers Comrs.* (1). Recent cases such as *Rex v. Morris, etc., West Riding JJ. Ex p. Broadbent* (2) and *General Medical Council v. Spackman* (3) show that the practice continues today. The explanation of all these cases is, I think, that the affidavits are treated by consent as if they were part of the record and make it a speaking order. Apart from these consent cases, it is often a very nice question whether an error which does not appear on the record is one which goes to jurisdiction or is only an error of law within the jurisdiction. If it goes to jurisdiction, affidavits are admissible, but otherwise not. I do not venture on a discussion of what does, or does not, go to jurisdiction, because it does not arise in this case. Nor do I venture on a discussion of the cases where Parliament has intervened to restrict the use of *certiorari* except to say that those restrictions can often be overcome by consent: see *Reg. v. Dickenson* (4). No such restriction appears in this case. We have here a simple case of error of law by a tribunal, an error which they frankly acknowledge. It is an error which deprives the applicant of the compensation to which he is by law entitled. So long as the erroneous decision stands, the compensating authority dare not pay him the money to which he is entitled lest the auditor should surcharge them. It would be quite intolerable if in such a case there were no means of correcting the error. The authorities to which I have referred amply show that the King's Bench can correct it by *certiorari*. It is true that the record which has been sent up to the court does not distinctly disclose the error, but that is only because the record itself is incomplete. The tribunal has sent up its decision, but it has not sent up the claim lodged with the compensating authority or the order made by them on it or the notice of appeal to the tribunal. Those documents would, I think, properly be part of the record. They would, I understand, have disclosed the error. If it had been necessary, the court could have ordered the record to be completed. But that is unnecessary, having regard to the fact that it was admitted in open court by all concerned that the decision was erroneous. I am clearly of opinion that an error admitted openly in the face of the court can be corrected by *certiorari* as well as an error that appears on the face of the record. The decision must be quashed, and the tribunal will then be able to hear the case again and give the correct decision. In my opinion, the appeal should be dismissed.

MORRIS, L.J., stated the facts, held that the submission made on behalf of the tribunal that in fact no error appeared on the record of the decision of the tribunal was not open to the tribunal as it had conceded before the Divisional Court that error was apparent on the face of the tribunal's order, and continued: The appeal really resolves itself into the question whether *certiorari* lies in a case where the decision of an inferior court or tribunal manifestly reveals legal error. That an order of *certiorari* will go to the respondent tribunal does not admit of doubt. The tribunal is an inferior court in the sense discussed by SCRUTTON, L.J., in his judgment in *Rex v. London County Council. Ex p. Entertainments Protection Assocn., Ltd.* (5) and by ATKIN, L.J., in his judgment in *Rex v.*

(1) (1843), 8 J.P. 214; 5 Q.B. 357; 114 E.R. 1284.

(2) (1910), 74 J.P. 271; *sub nom. Rex v. West Riding of Yorkshire JJ. Ex p. Broadbent*, [1910] 2 K.B. 192.

(3) [1943] 2 All E.R. 337; [1943] A.C. 627.

(4) (1857), 22 J.P. 243; 7 E. & B. 831.

(5) 95 J.P. 89; [1931] 2 K.B. 215.

Electricity Comrs. Ex p. London Electricity Joint Committee Co. (1920), Ltd. (1). In the former of the two cases just referred to SCRUTTON, L.J., spoke of the writ of *certiorari* as enabling the Court of King's Bench to control the action of inferior courts and to make it certain that they shall not exceed their jurisdiction. In the other case ATKIN, L.J., said that the controlling jurisdiction of the King's Bench Division was exercised when the inferior court acted in excess of their legal authority. But in neither passage was there more than a broad and general description of the nature of the writ. I do not read the judgments as embarking on or as intending to lay down an exhaustive or delimiting definition of the scope of, or the occasions for the issuing of, the writ.

Cases were cited in argument before us which showed that in times past *certiorari* lay where justices recorded decisions which were on the face of them bad in law. It was said, however, that this was not shown to have been the practice in the case of non-judicial tribunals. But there is no warrant for the view that the controlling power exercised by *certiorari* over inferior courts varies according to the description of, or the composition of, the inferior court. Once the body concerned is properly to be described as an inferior court in the sense in which this expression is now well understood, then, subject to any statutory provision, an order of *certiorari* will issue on any of the grounds recognised by law. It was further said that, though these grounds were formerly wide enough to include cases where decisions were, on the face of them, bad in law, there has in recent years been a contraction, with the result that *certiorari* no longer lies for such reason. It is said that this basis for the exercise of the controlling power has fallen into abeyance. I can find no justification for this contention. The speeches in the House of Lords in *Walsall Overseers v. London & North Western Ry. Co.* (2) demonstrated that, if that which was stated on the face of an order of an inferior court showed that the order was erroneous in law, then the order could be removed by *certiorari* and its existence could be ended by quashing. The *Walsall* case (2) was in 1878. No reason was suggested in argument why it should be held that in the subsequent period (a brief one in comparison to the antiquity of the writ) the efficacy of *certiorari* should be diminished or why it should lose part of its virtue and strength. In *Kydd v. Liverpool Watch Committee* (3) FLETCHER MOULTON, L.J., said ([1907] 2 K.B. 603) in reference to cases when courts of quarter sessions had prior to 1879 given their decisions in the form of a Special Case for the opinion of the superior courts:

"The court of quarter sessions in such cases chose to embody the material and grounds of its decision in the decision itself. Any error in law in the decision became thereby an error on the face of the record, and therefore cognizable by the superior courts, should the record be brought up before them by the ordinary writ of *certiorari*. It was not as a court of appeal that the superior court sat when considering such Special Cases: it sat in the exercise of its ordinary jurisdiction to quash decisions of inferior courts, when those decisions were on the face of them bad in law."

The survey of the law by LORD SUMNER in 1922 in *Re v. Nat Bell Liquors, Ltd.* (4) lends no countenance to the view urged on behalf of the tribunal, but on the contrary negatives it. In my judgment, the law as laid down in the House of Lords in the *Walsall* case (2) must take precedence over any observations made

(1) 88 J.P. 13; [1924] 1 K.B. 171.

(2) (1878), 43 J.P. 108; 4 App. Cas. 30.

(3) [1907] 2 K.B. 591; *reversd.* H.L., 72 J.P. 395; [1908] A.C. 327.

(4) [1922] 2 A.C. 128.

in *Racecourse Betting Control Board v. Secretary of State for Air* (1) which may be in conflict.

It is plain that *certiorari* will not issue as the cloak of an appeal in disguise. It does not lie in order to bring up an order or decision for re-hearing of the issue raised in the proceedings. It exists to correct error of law where revealed on the face of an order or decision or irregularity, or absence of, or excess of, jurisdiction where shown. The control is exercised by removing an order or decision, and then by quashing it. A consideration of the authorities leads me to the same result as that reached by the Divisional Court, and I find myself in full agreement both with the conclusion and the reasoning of the judgment there delivered.

Appeal dismissed with costs.

Solicitors: *Solicitor, Ministry of Health* (for the tribunal); *Gwyllyn T. John* (for the applicant). C.N.B.

(1) [1944] 1 All E.R. 60; [1944] Ch. 114.

CHANCERY DIVISION

(VAISEY, J.)

Dec. 13, 14, 17, 1951

NATIONAL TRUST FOR PLACES OF HISTORIC INTEREST OR NATURAL BEAUTY *v.* MIDLANDS ELECTRICITY BOARD AND ANOTHER

Electricity Supply—Powers of undertakers—Erection of poles to carry supply line—Necessity for consent of local authority—Persons entitled to be heard—“Parties concerned”—Electric Lighting (Clauses) Act, 1899 (62 and 63 Vict., c. 19), schedule, s. 10 (b)—Electricity (Supply) Act, 1919 (9 and 10 Geo. 5, c. 100), s. 21, s. 22 (1)—Electricity Act, 1947 (10 and 11 Geo. 6, c. 54), s. 57 (2), sched. IV, Part III.

By a deed dated Apr. 28, 1936, and made between the Ecclesiastical Commissioners, of the one part, and the National Trust, of the other, after recitals which (*inter alia*) stated that the Ecclesiastical Commissioners had agreed to impose on certain “common lands” owned by them the restrictive covenants thereafter contained for the benefit of Midsummer Hill and for the purpose of preserving the amenities of the Malvern Hills, it was witnessed that, in pursuance of that agreement, the Ecclesiastical Commissioners covenanted with the National Trust that (*inter alia*): “No act, or thing shall be done or placed or permitted to remain upon the land which shall injure prejudice affect or destroy the natural aspect and condition of the land . . .” On May 1, 1936, the restriction was registered under the Land Charges Act, 1925, s. 10 (1) as a land charge affecting the “common lands.” In 1947 the functions and property of the Ecclesiastical Commissioners were vested in the Church Commissioners for England by virtue of the Church Commissioners Measure of that year. In or about 1950 the Midlands Electricity Board, the area board constituted under the Electricity Act, 1947, entered upon a part of the “common lands” and erected wooden poles in pairs about forty-two feet in height to carry an overhead electricity supply line. The National Trust claimed an injunction against the Church Commissioners and the Midlands Electricity Board to restrain the erection or maintenance of the poles.

Held: (i) the wording of the restriction was vague and uncertain, and, therefore, the restriction was void for uncertainty.

(ii) by the Electricity (Supply) Act, 1919, s. 21, it was not incumbent on the Midlands Electricity Board to obtain the consent of the appropriate local authority to the erection of the poles.

(iii) persons entitled to enforce restrictive covenants relating to the land were “parties concerned” within the Electricity (Supply) Act, 1919, s. 22 (1).

Action by the National Trust for Places of Historic Interest or Natural

Beauty for a declaration that they were entitled to enforce certain restrictive covenants contained in a deed dated Apr. 28, 1936, against the Midlands Electricity Board and the Church Commissioners for England. They also claimed an injunction to restrain the erection or maintenance of certain poles erected by the electricity board for the purpose of supporting an overhead electricity supply line on land subject to the said restrictive covenants, and a mandatory order to demolish and remove some of the said poles.

M. Browne for the plaintiffs, the National Trust for Places of Historic Interest or Natural Beauty.

Pennycuik, K.C., and *Bourke* for the first defendants, the Midlands Electricity Board.

F. G. King for the second defendants, the Church Commissioners for England.

Dec. 17. **VAISEY, J.:** These proceedings relate to a place both of interest and also, more particularly, of natural beauty, namely, the Malvern Hills. They consist, as is well known, of a short and narrow range with about twenty summits varying in height from nine hundred to fourteen hundred feet and forming the watershed between the Severn and the Wye. One of these heights, known as Midsummer Hill, is and has at all material times been owned and occupied by the National Trust, and it has been declared inalienable under certain provisions of the National Trust Act, 1907. At the date of the deed next to be mentioned the Ecclesiastical Commissioners for England were the owners of certain lands in the neighbourhood of Midsummer Hill known as Castlemorton Common, Shady Bank Common, and Holly Bed Common, to which I will refer as "the common lands." By that deed, which is dated Apr. 28, 1936, and made between the said Ecclesiastical Commissioners, of the one part, and the National Trust, of the other part, after recitals which *inter alia* state that the Ecclesiastical Commissioners had agreed to impose on the common lands the restrictive covenants thereafter contained for the benefit of Midsummer Hill and for the purpose of preserving the amenities of the Malvern Hills, it is witnessed that in pursuance of that agreement the Ecclesiastical Commissioners

"with intent and so as to bind as far as practicable [the common lands] into whatsoever hands the same may come and to benefit and protect Midsummer Hill aforesaid"

covenanted with the National Trust at all times thereafter to observe the stipulations and restrictions contained in the schedule thereto. I turn to the schedule, and read the first two of the four paragraphs of which it consists:

"(1) No act or thing shall be done or placed or permitted to remain upon the land which shall injure prejudice affect or destroy the natural aspect and condition of the land except as hereinafter provided. (2) No building shall at any time hereafter be erected upon any part of the land by or with the consent of the covenantors [the Ecclesiastical Commissioners]."

On May 1, 1936, the said restrictions were duly registered under the Land Charges Act, 1925, s. 10 (1), as a land charge affecting the common lands. By virtue of the Church Commissioners Measure, 1947, the functions and property of the Ecclesiastical Commissioners were vested in the second defendants, the Church Commissioners for England, who thereupon became, and still are, the owners of the common lands.

The first defendants to this action, the Midlands Electricity Board, are one of the area boards constituted by or under the Electricity Act, 1947, s. 1, s. 2 and s. 3, and the area which they are concerned to administer consists of the counties of Hereford and Worcester and parts of Gloucestershire, Oxfordshire,

Shropshire, Staffordshire and Warwickshire (including Birmingham). Shortly before the commencement of this action, the board entered on a small part of the common lands and erected or began to erect some poles to carry an overhead electricity supply line across part of the common lands. These poles are wooden poles in pairs connected by cross-struts, and are about forty-two feet in height. Lines of cable are carried across the top of the poles and link them together in a continuous line. The National Trust alleges that the erection, existence and maintenance of these poles and this electric supply line constitute a breach of the restrictive covenants. They plead that they have thereby suffered damage, that their enjoyment of Midsummer Hill has been seriously disturbed, and, in particular, that the view from Midsummer Hill over the common lands is prejudicially affected. They claim a declaration that they are entitled to enforce the restrictive covenants against both the defendants, and are entitled to an injunction to restrain the erection or maintenance of certain of the poles and the suspended supply line. They claim also a mandatory order to pull down and remove some of the said poles.

The first and fundamental point to be considered is the meaning and effect of the restrictive conditions. Let me deal first with the second, which reads as follows:

"No building shall at any time hereafter be erected upon any part of the land by or with the consent of the covenants,"

a word which now, in the events which have happened, means the Church Commissioners. In my judgment, these poles are certainly not buildings though they may well be erections or structures, and for that proposition I rely on *Wood v. Cooper* (1) and *Paddington Corp'n. v. A.-G.* (2). Even if they are buildings, they have not been erected by or with the consent of either the Ecclesiastical Commissioners or the defendants, the Church Commissioners.

The matter, therefore, in my view, rests on the first of the restrictions, which it will be remembered is to this effect:

"No act or thing shall be done or placed or permitted to remain upon the land which shall injure prejudice affect or destroy the natural aspect and condition of the land except as hereinafter provided."

The exceptions do not throw any light on the point which has arisen here. In my judgment, the wording of this restriction is extremely inapt and ill-considered. It may, perhaps, be paraphrased thus: "No act shall be done and no thing shall be placed or permitted to remain on the land which shall injure prejudice affect or destroy the natural aspect and condition of the land." It would be difficult to find wider, vaguer and more indeterminate words than those. "Affect" following the word "prejudice" cannot, I think, mean "prejudicially affect" and must, therefore, mean "affect whether prejudicially or otherwise," that is to say, change or alter. Who is to say and what is to be the criterion of such an alteration of the natural aspect and condition of the land? There is no such qualification as might have been introduced by such words as "in the opinion of the National Trust" after the words "which shall," a qualification which would appear to have been accepted as sufficient in *Marquess of Zetland v. Driver* (3) where the words were

"no act or thing shall be done or permitted [on certain lands] which in the opinion of the vendor may be [*inter alia*] prejudicial or detrimental to the vendor and the owners or occupiers of any adjoining property or to the neighbourhood."

(1) [1894] 3 Ch. 671.

(2) 70 J.P. 41; [1906] A.C. 1.

(3) [1938] 2 All E.R. 158; [1939] Ch. 1.

It is, no doubt, easy to suggest some acts and things which would come within the prohibition—if, for example, the land were ploughed up or turned into a car-park or building estate. The difficulty here is to ascertain the limits of the prohibited acts. The burning of bracken, for instance, would, I should have thought, obviously affect the aspect and condition of the land. During the hearing counsel for the National Trust was driven to admit that the placing of a basket for litter on a short pole or a seat or a bench would amount to a breach of the condition. It is to be noted that it is both the aspect and the condition of the land which must be injured, prejudiced, affected, or destroyed. What does "aspect" mean? Presumably the appearance, but viewed from what point? If a man chooses to stand with his eye against one of these poles, obviously he would be able to see nothing of the land, but that cannot be what is meant. What does "condition" mean? I construe that as referring to the presence or absence of cultivation. How do these poles affect the condition of the land? It remains just the same as before. My garden remains a garden even though the post office erect a telegraph pole on it. In my judgment, the omission of any criterion by which these vague and uncertain words can be brought under some control is fatal to the validity of the restriction. I think it is void for uncertainty. It is so vague that it is really impossible of apprehension or construction, and, in my judgment, it is wholly unenforceable, but, whether it be wholly unenforceable or not, in my view, the erection of these poles does not come within the prohibition at all. They do, it is true, "affect" to some extent the "aspect" of the land, but how and to what extent they affect the "condition" of the land I fail to see. The land remains in the same condition now that it was before the poles were erected except possibly in regard to the few square inches on which the poles stand. The land remains open country, heath or scrub exactly as it was before the poles were put on it. This extraordinary combination of "aspect" and "condition" seems to me to involve an interference with the land both in its appearance and in its condition which what has been done and what it is proposed to do do not come anywhere near satisfying.

If, however, I am wrong both as to the unenforceability of the condition and as to the absence of any relevance in its terms to what has actually happened, there is the further difficulty how any restriction so worded can be said to benefit or protect Midsummer Hill. The nearest of these poles to Midsummer Hill is at least eleven hundred yards distant from it. No doubt, the poles are visible from Midsummer Hill on a reasonably clear day, but the effect of their presence or absence from the landscape must be quite infinitesimal. I may here observe that the National Trust has now obtained statutory powers to impose and enforce restrictions in gross, but the present case is not within those powers. I have here to deal with the ordinary case of protected and restricted land, assuming, contrary to my view, that the common lands have been validly restricted by the deed of Apr. 28, 1936. I think that Midsummer Hill has not been validly protected in the circumstances and it is only as the owners of Midsummer Hill that the National Trust can have any right of action in respect of these covenants.

If I am wrong on all these points, the further question arises whether the first defendants, the electricity board, have acted within and are proposing to act within their statutory powers and thereby are relieved from any obligation to observe the restrictions and excused for any breach of them which the erection of these poles would otherwise entail. In my judgment, this question must be answered in the affirmative. In their defence the electricity board claim that

by virtue of the provisions of the Electricity Act, 1947, and of those provisions of preceding Acts which are incorporated therein, and pursuant to consents of the Minister of Fuel and Power dated respectively Sept. 14 and 26, 1951, they have statutory power to place electricity poles on and above the common lands, and they say they will refer to such consents for their full meaning and intentment. They further say that, if it is necessary, they have obtained the express consent of the rural district council of Upton-upon-Severn.

The statutory justification for what the electricity board have done, are doing, and are proposing to do has to be ascertained from the actual terms of the legislative enactments. These are very largely what is called referential legislation and are not easy to follow. In the circumstances I do not propose to examine with any great degree of particularity the foundation and nature of these statutory powers. Counsel were good enough to refer me to a very large number of sections which are relevant in this connection, and I will first mention s. 17 of the Electric Lighting Act, 1882, which provides:

"Compensation for damage. In the exercise of the powers in relation to the execution of works given them under this Act, or any licence, order, or special Act, the undertakers shall cause as little detriment and inconvenience and do as little damage as may be, and shall make full compensation to all bodies and persons interested for all damage sustained by them by reason or in consequence of the exercise of such powers, the amount and application of such compensation in case of difference to be determined by arbitration."

It is not denied that the National Trust has or may have some right to be compensated under that section, which is still in force, although the amount of compensation which they are likely to recover, and the grounds on which their claim can be based, do not at the moment concern me. I merely state in passing that I think that the electricity board are justified in having pleaded as they do in their defence that under that section a remedy by way of compensation is provided for damage (if any) sustained as a result of the exercise of their powers by the electricity board, and that no other remedy is available to the plaintiffs. I am, of course, familiar with the principles laid down in *Shelfer v. City of London Electric Lighting Co.* (1) which limits to some extent the grounds on which such damage can be claimed, but that, in my judgment, is a matter with which I am not here concerned.

Next, I want to refer to s. 1 of the schedule to the Electric Lighting (Clauses) Act, 1899, which (as amended by the Electricity Act, 1947, s. 57 (2)) directs that the provisions of that schedule are to be read and construed in all respects subject to the provisions of *inter alia* the Electricity Act, 1947. The Acts and parts of Acts subject to which the schedule is to be read are collectively referred to in the schedule as the principal Act, and then follow a certain number of definitions. Section 10 (b), as amended by the Electricity Act, 1947, s. 57 (2), and sched. IV, Part III, provides:

"The undertakers [the electricity board] shall not, without the express consent and authorisation of the Minister of Fuel and Power and the express consent of the local authority also, place any electric line above ground except within premises in the sole occupation or control of the undertakers . . ."

A curious point arises there, because the Electricity Act, 1947, s. 57 (2), provides:

"The schedule to the Electric Lighting (Clauses) Act, 1899, shall, as from

(1) [1895] 1 Ch. 287.

the vesting date, be incorporated with this Act, and shall have effect, as so incorporated, subject to the adaptations and modifications specified in Part III of the said sched. IV."

But before that enactment took effect, the Electricity (Supply) Act, 1919, s. 21, had come into operation and is now binding on and can be taken advantage of by the electricity board. That section provides:

"Where the consent of the Board of Trade [now the Minister of Fuel and Power] is obtained to the placing of any electric line above ground in any case, the consent of the local authority shall not be required, anything in the Electric Lighting Acts, or in any order or special Act relating to the undertaking to the contrary notwithstanding . . ."

The effect of those enactments, in my judgment, is to excuse the Midlands Electricity Board in the present case from obtaining the consent of the appropriate local authority, the Upton-upon-Severn Rural District Council. Supposing I am wrong in that, I hold that express consent has been given by virtue of two letters written by the clerk of that authority to the chairman of the electricity board.

The Electricity Act, 1947, s. 9 (1), relates to the compulsory purchase of land, and provides:

"The Minister may authorise any electricity board to purchase compulsorily any land which they require for any purpose connected with the discharge of their functions . . ."

The Acquisition of Land (Authorisation Procedure) Act, 1946, with an immaterial exception, is to apply. That section obviously deals with an entirely different matter. First, it may well be that "land" includes easements, and, indeed, s. 9 (2) expressly so states, but this is not a compulsory purchase at all, and, in my judgment, s. 9 in no way limits the generality of the provisions to which I am now about to refer, i.e., s. 21 and s. 22 of the Electricity (Supply) Act, 1919, which is incorporated in the Act under which the electricity board in this case are acting. [His LORDSHIP again read s. 21 of the Act of 1919 and continued:] Section 22 (1) provides:

" . . . any authorised undertakers [in this case, the electricity board] may place any electric line below ground across any land, and above ground across any land other than land covered by buildings or used as a garden or pleasure ground in cases where the placing of such lines above ground is otherwise lawful, and where any line has been so placed across any land the . . . undertakers may enter on the land for the purpose of repairing or altering the line."

What does "otherwise lawful" mean? In my judgment, it means in every case in which there is not some direct infringement of some statutory right or some obviously wrong and illegitimate use of a power—such, for instance, as putting electric cables too low down across a foot-path, river, road, or railway. I do not think it is possible to regard those words, "otherwise lawful," as referring to the private rights of any particular individual. The proviso to s. 22 (1) is:

"Provided that, before placing any such line across any land, the . . . undertakers shall serve on the owner and occupier of the land notice of their intention, together with a description of the nature and position of the lines proposed to be so placed; and if, within twenty-one days after the service of the notice, the owner and occupier fail to give their consent or

attach to their consent any terms or conditions or stipulations to which . . . the undertakers object, it shall not be lawful to place the line across that land without the consent of [the Minister] . . ."

I thought at one time (and I now reject the idea) it could be argued that the owner and occupier of these common lands consisted of the combination of all persons whose consent is necessary in order to convey the unencumbered and unrestricted fee simple of the property to another person—in other words, it would include the Church Commissioners for the purpose of dealing with the freehold and the National Trust for the purpose of releasing their right or easement, assuming that such a right exists, and that the two would be co-owners for the purpose of this proviso. I do not think that is possible.

I think that the objection which was taken—that no proper notice had been served on the National Trust—is a false point. The proviso continues:

" . . . and [the Minister] may, if after giving all parties concerned an opportunity of being heard [he thinks] it just, give [his] consent either unconditionally or subject to such terms, conditions, and stipulations as [he thinks] just; and in deciding whether to give or withhold [his] consent, or to impose any terms, conditions, or stipulations (including the carrying of any portion of the line underground) [the Minister] shall, among other considerations, have regard to the effect, if any, on the amenities or value of the land of the placing of the line in the manner proposed."

At one time the electricity board took the view that the National Trust, in their capacity of persons entitled to enforce these restrictions, was not a "party concerned" to whom opportunity should be given. In my judgment, that view is wrong. Assuming, of course, that the restrictions are valid, and that the National Trust are in a position to enforce them, then I think in that respect they are "parties concerned" who should have been heard. No harm has been done in this case, because they were heard at the inquiry which took place previous to the sanction by the Minister of this scheme, but I put it on record that, in my view (so far as the point is material in the present case), persons entitled to enforce restrictive covenants for land are "persons concerned" to whom an opportunity of being heard should be given. On all the points to which I have referred I am bound to hold that this action fails and must be dismissed.

Action dismissed.

Solicitors: A. A. Martineau (for the plaintiffs); Sydney Morse & Co., agents for G. P. Wilson, Solicitor to the Midlands Electricity Board; Milles, Day & Co. (for the second defendants).

R.D.H.O.

NOTE.

COURT OF APPEAL

(SOMERVELL, JENKINS AND HODSON, L.JJ.)

Dec. 10, 11, 12, 20, 1951

LANE v. LANE

Justices—Desertion—Evidence—Notes of proceedings on earlier summons.

APPEAL by the husband from a decision of the Divisional Court dated Apr. 18, 1951, affirming an order of Bradford (Yorkshire) justices dated Nov. 6, 1950, whereby they found that the husband had deserted his wife and ordered him to pay maintenance of £2 a week.

The parties were married on Dec. 21, 1946. On Apr. 28, 1950, the wife left her husband, and the justices found that, in view of his conduct, he had been guilty of constructive desertion and made a maintenance order against him. On Oct. 8, 1950, at the instance of the wife, the parties resumed cohabitation, but there were differences between them, and eight days later the wife again left the husband and took out a summons alleging desertion. On the hearing of this summons the justices made the order which was the subject of the present appeal. The justices on this occasion were not the same as those adjudicating on Apr. 28, and there was no cross-examination as to what took place when the first order was made. Before the Divisional Court the notes of the first hearing were considered by the court as forming part of the history of the case.

On appeal four points were taken: (i) Did the husband's conduct amount to constructive desertion? (ii) Was the Divisional Court entitled to look at the notes of the previous proceedings between the parties although they were not in evidence before the justices? (iii) Was the doctrine of condonation and revival applicable to desertion so that conduct falling short of what would be required to prove desertion originally might be sufficient to revive condoned desertion? (iv) Was the amount payable under the order too high? The Court of Appeal (JENKINS, L.J., *dissentiente*) held on the facts that the justices were entitled to hold that the husband's conduct amounted to constructive desertion and that they had not erred in principle in the amount of maintenance ordered.

Simon, K.C., and B. Garland for the husband.

Tyndale, K.C., and Hazel for the wife.

Cur. adv. vult.

Dec. 20. SOMERVELL, L.J., dealing with the notes of the first hearing said that in a case like the present when there had been a resumption of cohabitation and a second separation of the parties, the reasons which led to the previous desertion might be of vital importance. If, for example, a wife had been driven out on the first occasion by repetition over a period of time of a course of conduct, whether physical or verbal, a resumption of cohabitation, if the offending spouse was genuine, must clearly be on the basis that he or she would abstain from renewing that course of conduct. With that history, any real indication, though over a very short period of time, that the offending spouse was going to behave as before might result in his being guilty of constructive desertion, although his present conduct alone, without evidence of the past history of the case would be insufficient to establish such desertion. It was not that proof of a lesser matrimonial offence was sufficient in the sense in which it was said in *Beard v. Beard* (1) that matrimonial misconduct short of a matrimonial offence could

(1) [1945] 2 All E.R. 306; [1946] P. 8.

revive a condoned offence, but that the significance of the present acts was affected by what had gone before. The matter should, therefore, be considered on the basis that the notes of the first hearing were available material. Like all such notes, they must be treated with caution. They were not transcripts, nor was it right to assume that any particular fact deposed to in favour of the successful party was necessarily accepted by the justices.

HODSON, L.J., said that, although desertion as a complete offence under the law as it existed before 1937 was capable of condonation and revival—compare *Blandford v. Blandford* (1), where adultery and desertion for two years were condoned and held to be revived by subsequent adultery, and *Paine v. Paine* (2), where the same decision was reached in a case of desertion created by failure to comply with a decree of restitution of conjugal rights—yet a current period of desertion was on a different footing since it could be determined at any time by the return of the offending spouse and the deserted spouse had, at least in the case of simple desertion, no alternative but to receive the deserter. The question in such a case was not primarily one of condonation, but whether the desertion had been terminated, either by a resumption of cohabitation involving a bilateral act, or by the deserted spouse refusing to receive his or her partner, thereby turning himself or herself into the deserter. Conduct could always be looked at in the light of past history which threw light on it, and acts of minor significance in themselves, in the light of past history, might be of serious import. In the present case, the conduct of the husband during and after a resumption of cohabitation could be looked at in the light of his previous desertion to enable the court to form a judgment whether such conduct amounted to constructive desertion. It was only in this way that he (HIS LORDSHIP) would draw any distinction between acts of greater and those of less significance in connection with the origination of a fresh period of desertion.

Appeal dismissed.

Solicitors: *Ward, Bowie & Co.*, agents for *A. V. Hammond & Co.*, Bradford (for the husband); *Young, Jones & Co.*, agents for *James A. Lee & Priestley*, Bradford (for the wife).

G.F.L.B.

(1) (1883), 8 P.D. 19.

(2) [1903] P. 263.

COURT OF APPEAL

(SINGLETON, BIRKETT AND ROMER, L.JJ.)

December 3, 4, 20, 1951

REX v. GOVERNOR OF BRIXTON PRISON AND ANOTHER. *Ex parte*
PAWEL SLIWA

Alien—Deportation—Order that alien “shall be deported”—Validity—Aliens Order, 1920 (S.R. & O., 1920, No. 448), art. 12 (1).

Under the Aliens Order, 1920, art. 12 (1), the Home Secretary has power to make an order compelling an alien to leave the United Kingdom, as distinguished from requesting him to do so. There is no provision in the order of 1920 that before a compulsory order is made against an alien he must first be given the opportunity of leaving, and no special form of deportation order is provided.

Rez v. Home Secretary. Ex p. Chateau Thierry (Duke) (81 J.P. 125), applied.

APPEAL of applicant from a decision of the Divisional Court (LORD GODDARD, C.J., HILBERY and SLADE, JJ.), dated Oct. 18, 1951.

The applicant, who was detained in Brixton Prison under a deportation order made by the Secretary of State for Home Affairs, applied for a writ of *habeas corpus* on the ground (i) that the order was bad because it did not comply with the words of art. 12 (1) of the Aliens Order, 1920, and did not give the applicant the option to leave the country voluntarily; (ii) that the order was not served on the applicant; and (iii) that he was a political refugee opposed to the present Polish government and it was intended to put him on board a Polish ship on Oct. 5, 1951. The order was as follows: “Aliens Restriction Acts, 1914 and 1919. Deportation order made by the Secretary of State in pursuance of powers conferred by the Aliens Restriction Acts, 1914 and 1919, and art. 12 of the Aliens Order, 1920. Whereas under art. 12 (6) (c) of the Aliens Order, 1920, I deem it to be conducive to the public good to make a deportation order against Pawel Sliwa, an alien, in pursuance of the above mentioned powers I hereby order that the said Pawel Sliwa shall be deported from the United Kingdom, and shall remain thereafter out of the United Kingdom. And further, I direct that, from and after the service of this order upon the above-named alien he shall, until he can be conveniently conveyed to and placed on board the ship on which he is to leave the United Kingdom . . . be in custody.”

The Divisional Court refused the application on the ground (i) that the order was made in proper form and that the alien had no right of choosing the country where he wanted to go; (ii) that the order was served on the applicant; and (iii) that the choice of the country to which the alien was to be deported was left by Parliament to the Home Secretary; and, therefore, what happened after the alien was put in the ship was a matter which did not concern the executive government or the court. The applicant appealed to the Court of Appeal where only the first point was argued.

Weitzman, K.C., and Ogilvie Jones for the applicant.

Diplock, K.C., and J. P. Ashworth for the respondents.

Cur. adv. vult.

Dec. 20. The following judgments were read.

SINGLETON, L.J.: This is an appeal from an order of the Divisional Court by which a motion for a writ of *habeas corpus* on behalf of one Pawel Sliwa, an alien, was refused. The applicant is now in custody under an order of the Secretary of State for Home Affairs. The order was made on Oct. 6, 1950, though it was not served until almost a year later. It purports to be made under

the Aliens Restriction Acts, 1914 and 1919, and art. 12 of the Aliens Order, 1920.

Three questions were raised before the Divisional Court, but only one of them was argued before us and this can be stated shortly. It is claimed that the order of deportation made by the Secretary of State is bad in that it is not in form an order under art. 12 of the Aliens Order, 1920. It is said that art. 12 (1) gives the Secretary of State power to make an order requiring an alien to leave and thereafter to remain out of the United Kingdom, whereas the order made does not "require" any such thing, but orders that the applicant be deported. Therefore, it is submitted, the order is not an order within art. 12 (1), nor does it become such merely because the order contemplated is referred to in the article as a deportation order.

The Aliens Restriction Acts, 1914 and 1919, are to be read together, and they have been reviewed year by year. Section 1 of the Act of 1914 provided that restrictions might be imposed on aliens by Order in Council, and, by para. (c), that provision might be made by the order for the deportation of aliens from the United Kingdom. The Aliens Restriction (Consolidation) Order, 1916 (S.R. & O., 1916, No. 122), made under the Act, by art. 12 (1) provided that the Secretary of State might order the deportation of any alien, and that any alien with respect to whom such an order was made should forthwith leave the United Kingdom, and art. 12 (2) provided that where an alien was ordered to be deported under the order, he might, until he could, in the opinion of the Secretary of State, be conveniently conveyed to and placed on board a ship about to leave the United Kingdom, be detained in such manner as the Secretary of State directed, and, while so detained, be deemed to be in legal custody.

This article was considered in *Rex v. Home Secretary. Ex p. Duke of Chateau Thierry* (1), where VISCOUNT READING, C.J., said that the alien

" . . . must have the opportunity of leaving this country when the order for deportation is made, and he may go to any country he pleases."

In the Court of Appeal a different view of the order was taken: see *SWINFEN EADY*, L.J. (81 J.P. 127), *PICKFORD*, L.J. (*ibid.*, 128), and *BANKES*, L.J. (*ibid.*, 129). I cite a short passage from the judgment of *PICKFORD*, L.J.:

"The Secretary of State has two courses open to him. If he considers it safe to leave the alien at large he may rest himself only on sub-s. (1), and then it seems to me the alien is at liberty to choose his ship and his destination. If, on the other hand, he considers it right that the alien should not be left at large, he may act under sub-s. (2) and detain him as therein provided."

In 1919 there was a change made in art. 12 (1), and that change was maintained in the order of 1920 which is now in force and under which the Secretary of State acted in the present case. Article 12 provides:

"(1) The Secretary of State, may, if he thinks fit, in any of the cases mentioned in this article make an order (in this order referred to as a deportation order) requiring an alien to leave and to remain thereafter out of the United Kingdom. (2) An order made under this article may be made subject to any condition which the Secretary of State may think proper. (3) An alien with respect to whom a deportation order is made shall leave the United Kingdom in accordance with the order, and shall thereafter so long as the order is in force remain out of the United Kingdom. (4) An alien with respect to whom a deportation order is made, or a certificate is given by a court with a view to the making of a deportation order, may be detained in such manner as may be directed by the Secretary

(1) 81 J.P. 125; [1917] 1 K.B. 552.

of State, and may be placed on a ship about to leave the United Kingdom, and shall be deemed to be in legal custody whilst so detained, and until the ship finally leaves the United Kingdom . . . (6) A deportation order may be made in any of the following cases . . . (c) If the Secretary of State deems it to be conducive to the public good to make a deportation order against the alien."

It will be seen that the wording of art. 12 (1) differs from the wording of the order of 1916. Now the Secretary of State may make an order requiring an alien to leave and to remain thereafter out of the United Kingdom. The order he makes is still referred to as a deportation order.

It is a little surprising that, notwithstanding the change in art. 12 (1), the form of order used by the Home Office has remained just as it was previously, apart from an alteration made consequent on the judgment of *BANKES, L.J.*, in *Rex v. Home Secretary, Ex p. Bressler* (1). The order in the present case is an order that Pawel Sliwa shall be deported from the United Kingdom . . . followed by directions for his detention meanwhile. Article 12 (6) of the order of 1920 sets out the cases under which an order may be made, and the present case fell under para. (c). Great importance was attached by counsel for the applicant to the change in the form of art. 12 (1). He submitted that as it now stands (a) it presupposes a document or notice addressed to the alien, and (b) it is intended to give the alien an opportunity to leave the United Kingdom voluntarily on receiving notice under art. 12. There is some force in this argument, but I feel that it does not pay sufficient regard to art. 12 (4), under which an alien with regard to whom a deportation order is made

" . . . may be detained in such manner as may be directed by the Secretary of State, and may be placed on a ship about to leave the United Kingdom, and shall be deemed to be in legal custody whilst so detained . . . "

There is no reason why the Secretary of State should not use art. 12 (1) and art. 12 (4) together if he thinks fit so to do. In other words, once an order is made under art. 12 (1) the Secretary of State may direct detention of the alien under art. 12 (4). Virtually the power of the Secretary of State is just the same as it was under the order of 1916, though the wording of art. 12 has been changed. In practice, if the Secretary of State thinks it right, the alien is given an opportunity to leave. The order in this case was made on Oct. 6, 1950, and clearly the alien knew of it. The alien, in fact, applied for a passport at the Polish Consulate in December, 1950. The order was not served on him until Sept. 28, 1951. Thus, the position of the alien is just the same as it would have been if the order had been in the terms in which counsel for the applicant submits that it ought to have been in order to comply with art. 12 (1). It is not directed to the alien, but it names him, and it was served on him. It is an order and makes it clear what is required. The latter part of it contains provisions for his detention meanwhile, and the facts deposed to by the alien and his legal adviser would seem to show that he was given an opportunity to make arrangements for his departure from this country, though I do not consider that the Secretary of State was bound to allow that.

The objection raised is a technical one, based on the wording of the order. It is none the worse for that if it is sound. I think it fails, and I state my reasons shortly. (i) That which the Secretary of State is empowered to do is to make an order as distinguished from a request. (ii) An order requiring a person to leave envisages compelling him to leave. The Secretary of State can thus make an

order which compels the alien to leave. Whatever else can be said about the order, it is clear on that point. (iii) no special form of order is provided for use. That which was served was headed: "Deportation Order" (*vide* art. 12 (1)) and the powers under which it was made are set out. (iv) I do not think that there is any more substance in the argument that under the order of 1920 the alien *must* be given an opportunity to leave than there was in that addressed to the court under the order of 1916. To my mind, art. 12 (4) disposes of that. I am in favour of dismissing the appeal.

BIRKETT, L.J.: In the ordinary way I should have been content to express my agreement with the judgment that has just been delivered, but as the appeal is concerned with the liberty of a foreigner who alleges that he has particular reason to fear being deported to Poland I will state my own view quite briefly. The submission of counsel for the applicant was that the order of Oct. 6, 1950, made by the Secretary of State was a bad order, and his client was, therefore, illegally detained in custody. The order of Oct. 6, 1950, purported to be made in pursuance of powers conferred by the Aliens Restriction Acts, 1914 and 1919, and art. 12 of the Aliens Order of 1920.

Counsel for the applicant emphasised the importance of the difference between the wording of the Aliens Restriction (Consolidation) Order, 1916, and the Aliens Order, 1920. Under art. 12 of the order of 1916 the Secretary of State was empowered to "order the deportation of any alien," and the alien should "forthwith leave and thereafter and so long as the order remained in force remain out of the United Kingdom." Article 12 (1) of the Aliens Order of 1920 empowered the Secretary of State to make an order "requiring an alien to leave and to remain thereafter out of the United Kingdom." The order made in this case does not follow the wording "requiring an alien to leave," but uses the words "shall be deported from the United Kingdom," and it is on that ground that counsel for the applicant submits that the order is bad in law. The Secretary of State, he says, should have made an order addressed to the alien requiring him to leave the United Kingdom, and he has not done so, but has made an order of deportation in the words: "He shall be deported from the United Kingdom." We listened to considerable argument on the meaning of the words "requiring him to leave the United Kingdom," and I think the meaning of the words must be that for which counsel for the respondents contended, that is, "which requires" him to leave. Counsel for the applicant suggested that the words were more in accordance with a request to leave rather than an order to leave.

The order of 1920 has been in force for over thirty years, and the order of Oct. 6, 1950, followed the form which has been used throughout that period. It seems to me to be of importance to observe that the powers of the Secretary of State under the orders of 1916 and 1920 to order the alien to be detained in custody until he can be placed in a suitable ship and deported are substantially the same, although there is a slight difference in the wording. If, for example, the words "requires you to leave" had been in the order of Oct. 6, 1950, the Secretary of State could have ordered the detention of the alien immediately on the service of the order, and he could have been kept in custody until placed on board a suitable ship. This seems to be opposed to the view, for which counsel for the applicant contends, that the wording of the order of 1920 prescribes something in the nature of a request to leave addressed to the alien.

I must say I think it unfortunate that in a matter of such very great moment as a man's liberty it should be possible for a point of this kind to arise so that one of the judges in the Divisional Court, SLADE, J., should have thought it imperative to put on record the doubts and difficulties he felt in concurring in

the decision. On careful consideration of the whole matter I am of opinion that the order of Oct. 6, 1950, was a valid order. I do not think that the Aliens Order, 1920, by the change in language gave to the alien the opportunity to leave the country of his own accord, and only thereafter was the power of deportation to be exercised. I do not think that the absence of the words "I require you to leave" from the order of Oct. 6, 1950, makes the order invalid, nor do I think the presence of the words "shall be deported" does so either. I think that the Secretary of State exercising his powers under art. 12 (6) (c) of the order of 1920, which gave him power to make a deportation order if he deemed it to be conducive to the public good, was not bound to use the words: "I require you to leave," but by ordering the deportation of the alien made an order which required the alien to leave.

ROMER, L.J.: I agree with the judgments which have just been delivered.

Appeal dismissed.

Solicitors: *Miles Griffiths & Co.* (for the applicant); *Treasury Solicitor* (for the respondents). F.G.

CHANCERY DIVISION

(ROMER, L.J.)

Nov. 14, 15, 16, Dec. 21, 1951

Re BIRKENHEAD CORPORATION'S RESOLUTIONS. QUIGLEY v. BIRKENHEAD CORPORATION

Master and Servant—Trade dispute—Jurisdiction of National Arbitration Tribunal—Dispute between workman and employers arising out of interpretation of workman's contract of service—Conditions of Employment and National Arbitration Order, 1940 (S.R. & O., 1940, No. 1305), art. 7.

On Sept. 26, 1939, the defendant corporation passed a resolution that their employees who were called up for war service should have their war service pay augmented to their "full pay." By a resolution dated Jan. 23, 1940, "full pay" was defined as meaning the ordinary salary to which an employee would normally have become entitled had he continued in his civil duties, including any annual increment under the corporation's scale of salaries applicable to the particular grade in which he was serving when called up for war service, but excluding any increase of rates of pay or bonus granted by the corporation during the war. The plaintiff was employed by the corporation as a school teacher and served with the forces from Sept. 8, 1941, until his demobilisation in November, 1945, and on Dec. 12, 1945, he resumed civil employment as a school teacher with the corporation. By the Remuneration of Teachers Order, 1945, the Minister of Education directed local education authorities to pay to school teachers, as from Apr. 1, 1945, the new Burnham scales of salary, which increased the scales of salary for certain categories of teachers. Although the plaintiff was a teacher to whom the increased scales of salary applied, the corporation did not make up his war service pay to the increased amount as from Apr. 1, 1945. On Jan. 27, 1949, the corporation, purporting to act under the Conditions of Employment and National Arbitration Order, 1940, reported to the Minister of Labour and National Service a trade dispute existing between them and the plaintiff arising out of his claim for adequate augmentation of his war service pay as from Apr. 1, 1945. The Minister referred the report to the National Arbitration Tribunal, and, by an award dated Aug. 23, 1949, the tribunal found against the plaintiff. On the hearing of an originating summons taken out by the plaintiff to determine whether, under his contract of service with the corporation, he was entitled, as from Apr. 1, 1945, to have his

war service pay made up to the new Burnham scales of salary laid down in the order of 1945, it was contended on his behalf that the award made by the tribunal, dated Aug. 23, 1949, was *ultra vires* as the tribunal had no jurisdiction to entertain a question of contractual rights as such a matter was not a "trade dispute" within the meaning of the order of 1940.

HELD: the tribunal had jurisdiction to deal with the rights of employers and employees under private, as distinct from national, agreements of service; the dispute between the plaintiff and the corporation was a "trade dispute" within the order of 1940, and the tribunal had jurisdiction to hear it; and, accordingly, by the award dated Aug. 23, 1949, the matter as between the plaintiff and the corporation was *res judicata*.

ADJOURNED SUMMONS.

The plaintiff, a school teacher employed by the defendant corporation, served in His Majesty's Forces from Sept. 8, 1941, until November, 1945, when he was demobilised, and on Dec. 12, 1945, he resumed his employment as a school teacher with the corporation. By a resolution, dated Sept. 26, 1939, the corporation resolved that "pursuant to the provisions of the Local Government Staffs (War Service) Act, 1939, all permanent officers and servants who are contributors to the appropriate superannuation fund, and who . . . may be called up for war service . . . in connection with the present emergency, shall be paid, during the pleasure of the council, full pay, less government pay and allowances . . ." By a resolution of the corporation, dated Jan. 23, 1940, for the purpose of the war service allowances "full pay" was defined as meaning "the ordinary weekly or monthly wage or salary to which the officer or servant is or would normally have become entitled had he continued in his civil duties, and shall include any annual increment under the [corporation's] scale of salaries applicable to the grade in which he was serving when called up for war service, but shall exclude . . . any increase of rates of pay or bonus granted by the [corporation] during the . . . war." By the Remuneration of Teachers Order, 1945 (S.R. & O., 1945, No. 1317), the Minister of Education directed local education authorities to pay to teachers, as from Apr. 1, 1945, the scales of pay contained in the report of the Burnham Committee for 1945, whereby the scales of salary for certain categories of teachers was increased. The plaintiff, as well as a number of other teachers employed by the corporation, came within the categories affected by the order. As from Apr. 1, 1945, the corporation did not make up the war service pay of teachers to the new scales, and on Feb. 5, 1947, the Birkenhead branch of the National Association of Schoolmasters, purporting to act under the Conditions of Employment and National Arbitration Order, 1940, submitted a report to the Minister of Labour and National Service in respect of a trade dispute existing or apprehended between twelve members of the association and the defendant corporation arising out of claims by the members for adequate augmentation of their war service pay, and applied to the Minister to declare a trade dispute between the association and the corporation in respect of those claims and to refer the matter to the National Arbitration Tribunal for adjudication.

On the matter being referred to the tribunal by the Minister, the employees claimed that, as from Apr. 1, 1945, the new Burnham scale should be recognised as "full pay" for the purpose of the supplemental allowances made by the corporation to teachers on war service. By an award, dated Apr. 22, 1947 (Award No. 949), the tribunal found that the employees' claim had not been established.

The plaintiff, although a member of the National Association of Schoolmasters and employed by the corporation on similar terms and conditions as were applicable to the employees named in the report of Feb. 5, 1947, was not a party

to the proceedings which ensued as a result of the report, and on Oct. 14, 1947, he took out an originating summons under R.S.C., Ord. 54A, for the determination of the question whether, on the true construction of the resolutions of Sept. 26, 1939, and Jan. 23, 1940, he was entitled to be paid the supplementation grant in respect of his period of war service from Apr. 1, 1945, to the date of his demobilisation at the rate of pay applicable to him under the Remuneration of Teachers Order, 1945. On May 7, 1948, the summons came before ROMER, J., and was adjourned so that the National Arbitration Tribunal, on a reference to them by the Minister of Labour on the application of the corporation, might determine (i) whether, as a matter of interpretation of Award No. 949, the plaintiff was a "party" to the award and, accordingly, bound thereby, and (ii), if not, whether he was a worker "to whom the . . . award relates" so as to be bound thereby under the Conditions of Employment and National Arbitration Order, 1940, art. 2 (5). On Jan. 14, 1949, the tribunal issued a determination that the plaintiff was a party to the trade dispute, but was not a worker to whom the award related so as to be bound thereby.

As a result of that determination, on Jan. 27, 1949, the corporation reported to the Minister a trade dispute existing between them and the plaintiff, describing the dispute in terms similar to the description of the earlier dispute contained in the report of Feb. 5, 1947, and stating that a like dispute was apprehended between them and the other school teachers employed by them who were not parties to or bound by Award No. 949. By an award, dated Aug. 23, 1949 (Award No. 1313), the tribunal found against the plaintiff's claim.

On July 25, 1951, the originating summons was restored for further hearing, and counsel for the plaintiff submitted (i) that the questions raised by the summons were not the same as the "dispute" which the tribunal had decided by Award No. 1313, and (ii) that, if it were decided that they were, the tribunal had no jurisdiction to entertain the matter and had acted *ultra vires* in purporting to do so. As the learned judge considered that the second point raised a question of principle of such importance that it should not be decided without giving the tribunal and the Minister of Labour the opportunity of being represented, the summons was stood over again. On Oct. 24, 1951, by leave of the learned judge, the plaintiff amended his originating summons by adding in his claim to relief the words "notwithstanding Award No. 1313 dated Aug. 23, 1949, of the National Arbitration Tribunal which was *ultra vires*." On Nov. 14, when the amended summons came up for argument, the Minister of Labour was represented by counsel appearing as *amicus curiae*, but the National Arbitration Tribunal did not appear.

Salmon, K.C., and *N. N. McKinnon* for the plaintiff.

Salt, K.C., and *Miss B. A. Bicknell* for the defendant corporation.

S. B. R. Cooke as *amicus curiae*.

Cur. adv. vult.

Dec. 21. ROMER, L.J., read a judgment in which he set out the facts, and continued: Counsel for the plaintiff enunciated the following questions for consideration: (i) whether under his contract of service with the defendant corporation the plaintiff was entitled to have his pay made up to the new Burnham scale between Apr. 1 and November, 1945; (ii) as to the true construction of the resolutions of the corporation passed respectively on Sept. 26, 1939 and Jan. 23, 1940, and, in particular, as to the proper interpretation of the words "full pay" as used therein; (iii) whether question (i) in conjunction with question (ii) was the "dispute" which was the subject of Award No. 1313; (iv) if so, whether the National Arbitration Tribunal had jurisdiction to entertain it. Of these questions I propose to consider numbers (iii) and (iv)

first, for, if they are both decided adversely to the plaintiff, then, as counsel on his behalf rightly conceded, the matter is *res judicata* and the plaintiff cannot succeed on his summons. Were, then, the rights which the plaintiff seeks to have established by declaration on this originating summons the same as his claims which were negatived by Award No. 1313? [His LORDSHIP referred to *National Association of Local Government Officers v. Bolton Corporation* (1); stated that the plaintiff and his fellow employees had acquired contractual rights by virtue of the resolutions of Sept. 26, 1938, and Jan. 23, 1940; examined the statements of the employers' and employees' cases in the arbitration proceedings and the terms of the awards; and continued:] I have no doubt that both in the first and in the second arbitration proceedings the employees' contractual rights under the two resolutions were in issue, and I must, accordingly, decide this question adversely to the plaintiff.

The next question for consideration is whether the National Arbitration Tribunal had jurisdiction to decide the rights of the plaintiff under his contract of service with the corporation. The answer to this question depends on the true construction and effect of the Conditions of Employment and National Arbitration Order, 1940, hereinafter referred to as "the order of 1940"—but it would first be convenient to consider the Defence (General) Regulations, 1939 (S.R. & O., 1939, No. 927, as amended by S.R. & O., 1940, No. 1217), reg. 58AA, by virtue of which the order of 1940 was made. Paragraph (1) of reg. 58AA provides:

"With a view to preventing work being interrupted by trade disputes, the Minister of Labour and National Service may by order make provision—(a) for establishing a tribunal for the settlement of trade disputes, and for regulating the procedure of the tribunal; (b) for prohibiting, subject to the provisions of the order, a strike or lock-out in connection with any trade dispute; (c) for requiring employers to observe such terms and conditions of employment as may be determined in accordance with the order to be, or to be not less favourable than, the recognised terms and conditions; (d) for recording departures from any rule, practice or custom in respect of the employment, non-employment, conditions of employment, hours of work or working conditions of any persons; (e) for any incidental and supplementary matters for which the Minister thinks it expedient for the purpose of the order to provide."

By para. (4):

"In this regulation the expression 'trade dispute' has the same meaning as in the Industrial Courts Act, 1919."

The order of 1940 (as amended) is as follows. The recital is:

"The Minister of Labour and National Service (hereinafter referred to as 'the Minister') with a view to preventing work being interrupted by trade disputes and by virtue of the powers conferred on him by reg. 58AA of the Defence (General) Regulations, 1939, hereby makes the following order."

By art. 1:

"For the purpose of settling trade disputes which cannot otherwise be determined there shall be constituted by the Minister a tribunal to be called 'the National Arbitration Tribunal' and the provisions of the schedule to this order shall have effect with respect to the constitution and proceedings of the tribunal."

(1) 106 J.P. 255; [1942] 2 All E.R. 425; [1943] A.C. 166.

By art. 2:

"(1) If any trade dispute exists or is apprehended that dispute, if not otherwise determined, may be reported to the Minister by or on behalf of either party to the dispute and the decision of the Minister as to whether a dispute has been so reported to him or not and as to the time at which a dispute has been so reported shall be conclusive for all purposes. (2) The Minister shall consider any dispute so reported to him as aforesaid and if in his opinion suitable means for settling the dispute already exist by virtue of the provisions of any agreement to which the parties are organisations representative of employers and workers respectively, he shall refer the matter for settlement in accordance with those provisions: so, however, that where a matter has been referred for settlement in accordance with the provisions of this paragraph and there is a failure to reach a settlement or, in the opinion of the Minister, a settlement is unduly delayed, the Minister may cancel the reference and substitute therefor a reference to the National Arbitration Tribunal. (3) Where, in his opinion, no such suitable means of settlement exist as are mentioned in the last preceding paragraph of this article, the Minister shall take any steps which seem to him expedient to promote a settlement of the dispute and may, if he thinks fit, refer the matter for settlement to the National Arbitration Tribunal. (4) Where steps to promote a settlement of the dispute have been taken by the Minister under the provisions of para. (2) or para. (3) of this article (otherwise than by means of a reference to the National Arbitration Tribunal) and those steps have not resulted in a prompt settlement of the dispute, the Minister shall refer the dispute for settlement to the National Arbitration Tribunal and shall do so within twenty-one days from the date on which the dispute was so reported to him as aforesaid, unless, in his opinion, the special circumstances of the case make it necessary or desirable to postpone such a reference. (5) Any agreement, decision or award made by virtue of the foregoing provisions of this article shall be binding on the employers and workers to whom the agreement, decision or award relates and, as from the date of such agreement, decision or award or as from such date as may be specified therein, not being earlier than the date on which the dispute to which the agreement, decision or award relates first arose, it shall be an implied term of the contract between the employers and workers to whom the agreement, decision or award relates that the rate of wages to be paid and the conditions of employment to be observed under the contract shall be in accordance with such agreement, decision or award until varied by a subsequent agreement, decision or award."

By art. 3 and art. 4:

"3. The Minister may refer to the National Arbitration Tribunal for advice any matter relating to or arising out of a trade dispute or trade disputes in general or trade disputes of any class or any other matter which, in his opinion, ought to be so referred. 4. An employer shall not declare or take part in a lock-out and a worker shall not take part in a strike in connection with any trade dispute unless the dispute has been reported to the Minister in accordance with the provisions of art. 2 of this order and twenty-one days have elapsed since the date of the report and the dispute has not during that time been referred by the Minister for settlement in accordance with the provisions of that article."

By art. 5 (as amended by S.R. & O., 1942, No. 1973, and S.R. & O., 1944, No. 1437):

"(1) Where in any trade or industry in any district terms and conditions of employment are established which have been settled by machinery of negotiation or arbitration to which the parties are organisations of employers and trade unions representative respectively of substantial proportions of the employers and workers engaged in that trade or industry in that district (hereinafter referred to as 'recognised terms and conditions') all employers in that trade or industry in that district shall observe the recognised terms and conditions or such terms and conditions of employment as are not less favourable than the recognised terms and conditions. (3) If any question arises as to the nature, scope or effect of the recognised terms and conditions in any trade or industry in any district or as to whether an employer is or was observing the recognised terms and conditions or is or was observing terms and conditions which are or were not less favourable than the recognised terms and conditions, that question may be reported to the Minister . . . by any organisation of employers or any trade union which in the opinion of the Minister is an organisation or trade union that habitually takes part in the settlement of wages and working conditions in the trade or industry concerned and if so reported the question shall thereupon be dealt with in the same manner as if it were a trade dispute reported to the Minister under the provisions of art. 2 of this order and the provisions of that article shall apply accordingly: so, however, that in making an award on any question referred by the Minister by virtue of the powers conferred by this paragraph the National Arbitration Tribunal shall have regard not only to the provisions of para. (2) of this article, but also to any collective agreements concerning the terms and conditions of similar workers in comparable trades or industries . . . (4A) Where an award has been made by the National Arbitration Tribunal in consequence of a report made under the foregoing provisions of this article, then as from the effective date of the award, it shall be and, in the case of a retrospective award, shall be deemed to have been an implied term of the contract between the employer and workers to whom the award applies that the rate of wages to be paid and the conditions of employment to be observed under the contract shall, until varied by a subsequent agreement, decision or award such as is mentioned in the foregoing provisions of this article, be in accordance with the award. (5) Any reference in the foregoing provisions of this article to an agreement, decision or award shall be construed as a reference to that agreement, decision or award as modified by any subsequent agreement, decision or award."

Article 7 defines a trade dispute as follows:

"'trade dispute' means any dispute or difference between employers and workmen, or between workmen and workmen connected with the employment or non-employment, or the terms of the employment or with the conditions of labour of any person."

Counsel for the plaintiff did not contend that on this definition a dispute between one employee and his employers is not included within it—and, indeed, I understand that this point has been affirmatively decided by a Divisional Court: [see *Rex v. National Arbitration Tribunal. Ex p. South Shields Corpn.* (1)].* Further than this, counsel for the plaintiff conceded that, if the terms of the

* As to position under the Industrial Disputes Order, 1951, see *ibid.*

(1) 115 J.P. 594; [1951] 2 All E.R. 828.

definition be given their literal meaning, they are wide enough to include the dispute which has arisen between the plaintiff and the corporation. He argued, however, that some of the other provisions of the order of 1940 compel a narrower construction of the definition than that which its language *prima facie* demands, and, in particular, that the literal interpretation of the definition should be cut down so as to exclude a dispute between a workman and his employers arising out of the interpretation of the workman's contract of service. The way he put his case was this. He argued first that the settlement of contractual disputes was outside the purview of the Defence (General) Regulations, 1939, reg. 58AA, which envisaged claims of employees, not in enforcement of their contractual rights, but for extra wages or improved conditions which were outside and beyond those to which their agreements already entitled them—claims for the settlement of which no tribunal already existed and which, unless speedily dealt with, might lead to disastrous strikes in a time of national emergency. The order of 1940 was brought into being to avert such dangers as these and not to facilitate the settlement of private contractual disputes for the determination of which tribunals, namely, His Majesty's courts, already existed. Counsel for the plaintiff then pointed to art. 2 (5) as supporting this general approach to the order. This paragraph has a dual effect. It provides (i) that any award made under art. 2 shall be binding on the employers and employees concerned; and (ii) that, as from the date of the award (or other date as therein specified) its terms shall (in effect) be incorporated by implication in the contracts already existing between such employers and employees respectively. How, asked counsel for the plaintiff, could an award interpreting a provision of a subsisting contract be implied as a term of that contract? What the second part of art. 2 (5) is aiming at, he says, is the incorporation in the contract of something that is not already in it, for example, some change in wages or working conditions. Counsel for the plaintiff then contrasted art. 2 of the order with art. 5. That article, while empowering the reference of certain agreements to the tribunal, is confined to national agreements, and, although the tribunal can consider and decide the effect of such agreements, there is no provision (as there is in art. 2) that its award shall be binding on the parties concerned. It is merely provided that it shall thenceforth be an implied term of the national agreement to which it relates. From the above considerations counsel for the plaintiff proceeds to the conclusion that, notwithstanding the width of the definition of "trade dispute," differences arising out of the interpretation of private, as distinct from national, agreements of service are outside it. And, by way of illustration, he said that it would be monstrous if an employee, having a long-term service agreement, who was summarily dismissed for fraud, could be taken, at the instance of his employers, to the tribunal and be thus deprived of his rights as a citizen to have his case heard and determined by a judge and jury.

The contrary arguments (apart from the citation of authority, which I will consider later) of counsel for the defendant corporation may be summarised as follows. The language of the definition of "trade dispute" in art. 7 of the order so plainly covers differences such as that which has arisen between the plaintiff and the corporation that the court cannot be justified in excluding them in the absence of compelling indications in other parts of the order, and no indications sufficiently compelling are to be found. My attention was drawn to the fact that the definition is not the hurried work of some hard-pressed draftsman in time of war, but was fashioned in its present shape so long ago as 1906. The definition is to be found in substantially the same terms in s. 5 (3) of the Trades Disputes Act, 1906. This statute was not concerned with industrial

conciliation, but the definition, in precisely its present form, appears again in s. 8 of the Industrial Courts Act, 1919. And, as appears from the Defence (General) Regulations, 1939, reg. 58AA, that regulation specifically provides that the term is to have the same meaning as that in the Act of 1919. It is, accordingly, argued, with some force, that a strong case must be made out for whittling down the plain meaning and effect of words which, presumably, have received legislative consideration over so long a period of years and which no legislative authority has ever thought proper to alter. It was then submitted that in practically every case where a dispute arises by reason of employees demanding, and employers refusing, an increase in wages or improved conditions the first thing the tribunal has to do is to inquire what are the subsisting wages and conditions to which the men, by virtue of their contracts, are already entitled, and that in many cases such an inquiry necessarily involves the interpretation of such contracts by the tribunal. From this it is argued that the consideration and construction, not only of national, but of private agreements as well, must surely have been within the contemplation of the authors of the order of 1940. As to the plaintiff's argument founded on the second provision of art. 2 (5), it was submitted to me that the fact that it could have no application to a case such as the present is irrelevant and is quite insufficient to warrant the cutting down of the definition of trade dispute in the way that the plaintiff invites me to do. The first provision of art. 2 (5) is applicable to all decisions or awards of the tribunal, including the one now under consideration, made on references to it under art. 2. The second provision is applicable to the general run of such references made on claims for wages or conditions beyond those already conferred by contract. The fact that this particular provision is inapplicable to certain claims cannot justify the view that, notwithstanding the plain meaning of "trade dispute" in art. 7, the definition article, the scope of the order is confined to disputes which admit of the application of that provision.

In my judgment, and apart altogether from such authority as exists on the subject, the arguments of counsel for the corporation are sound. The obvious intention of the order of 1940 was to establish a tribunal which could deal, and deal speedily (for speed was clearly one of the main objects of the order), with disputes between employers and workmen which, unless so dealt with, might result in strikes and lock-outs at a time when this country could least afford industrial unrest. Such unrest can well arise from a grievance, real or imaginary, arising under a private contract of service, and it appears to me to be inherently improbable that the intention of the order was to exclude disputes resulting from such grievances from its scope. Approaching the order, then, from this point of view, one is not surprised to find that disputes of this character are unquestionably within its scope if one looks to the definition article alone, and, in my judgment, it would require a great deal more than the matters relied on by counsel for the plaintiff to justify the alteration of the definition and, by so doing, to arrive, not at an expected, but at an unexpected, result. I am not greatly impressed by the force of the hypothetical case, suggested by counsel for the plaintiff, of the long-term employee summarily dismissed for dishonesty. Assuming that the difference arising therefrom could, in fact, be regarded as a "trade dispute," the jurisdiction of the tribunal would only be concurrent with, and not exclusive of, that of the courts. And if the employee immediately issued a writ for damages, as he most probably would, I have no doubt but that the Minister could and would (unless anticipating immediate industrial unrest) refrain from taking action on any report submitted to him by the employers pending the trial in the courts. If, on the other hand, he had reason to suppose

that the dismissal would occasion immediate and widespread sympathetic strike action by fellow employees or others, I see no reason why he should not avail himself of the speedy machinery of the tribunal rather than wait until the employees' action had been decided by the courts and, possibly, by the ultimate appellate tribunal.

I turn now to the authorities to which I was referred. In *Rex v. National Arbitration Tribunal. Ex p. Horatio Crowther & Co., Ltd.* (1) the headnote is:

"Since November, 1946, workmen employed by the applicants, a company, through their union had pressed for changes in wages and conditions of service. On Mar. 28, 1947, the company gave the workmen on the manufacturing side of their business, including those in the union, notice terminating their employment as from Apr. 4. On Apr. 14, the matter was reported to the Minister of Labour and National Service, who referred it to the National Arbitration Tribunal. The claim of the workmen included *inter alia*: '(1) The reinstatement from the date of dismissal of the workers dismissed.' The award of the tribunal stated: 'They find in favour of the claim set out in item (1) . . . and award accordingly.' On an application for an order of *certiorari* to quash the award: HELD: (i) although at the date of the report to the Minister of Labour the contract of service between the company and the workmen had been terminated, there was nevertheless a 'trade dispute,' within the meaning of art. 7 of the order of 1940, which had been properly referred under art. 2 (1). (ii) a direction to reinstate the workmen would be *ultra vires* the tribunal, and, as (CROOM-JOHNSON, J., *dissentiente*) the finding on item (1) of the claim was equivalent to such a direction, the award in so far as it related to that finding must be quashed."

LORD GODDARD, C.J., after referring to the notice determining the men's employment, said ([1947] 2 All E.R. 694) that no question arose as to that being in any way a notice otherwise than in accordance with the contracts of service. Then, in the course of considering and rejecting the argument submitted on behalf of the employers that there could not be a trade dispute between them and employees whose employment had already been determined, he said (*ibid.*, 695):

"Supposing a dispute arose whether the workers in a particular industry or branch of an industry could be, as the employers contended, dismissed at an hour's notice or whether they were entitled, as the workers contended, to a week's notice. There you would have a dispute connected with the terms of employment. It appears to me clear that an employer could not avoid a reference by the Minister if the matter was reported to him by discharging his workmen and saying: 'They are no longer in my service, whether I rightly or wrongly dismissed them.' If an employer discharges his workmen without proper notice, although the workmen would have an action for wrongful dismissal, they are not from the moment of discharge in the employer's service, but if the contention advanced by the employers in this case be right the question of what notice workers in this industry or this factory should be given could not be settled by the tribunal."

In *Rex v. National Arbitration Tribunal. Ex p. Imperial Tobacco Co., Ltd.* (2) the headnote is:

"A war emergency committee was set up in the tobacco industry in 1941, and the workers' side of the committee asked for increases of rates of wages,

(1) [1947] 2 All E.R. 693; [1948] 1 K.B. 424.

(2) [1943] 2 All E.R. 162.

which the employers' side refused. As they were unable to come to an agreement the Ministry of Labour and National Service, in answer to an application by the workers' side, made an order under the Conditions of Employment and National Arbitration Order, 1940, referring the dispute to the National Arbitration Tribunal, a body set up by the same order. The employers applied for orders of prohibition on the ground that the tribunal had no jurisdiction to hear the dispute. They maintained that the Conditions of Employment and National Arbitration Order, 1940, art. 1, which provided that the tribunal should be constituted for 'the purpose of settling trade disputes which cannot otherwise be determined' must be construed as 'for the purpose of settling trade disputes for the determination of which no machinery exists,' and that, as the workers' claims were in effect claims for minimum rates, the machinery of the trade board existed for the settlement of the disputes: **HELD:** the workers' claims were not for minimum rates of wages. The disputes arose out of claims for rises on actual rates of wages paid, and, consequently, the trade board had no jurisdiction to hear the present disputes. The Conditions of Employment and National Arbitration Order, 1940, has to be read as a whole and art. 1 does not limit the jurisdiction of the tribunal."

For present purposes that case is mainly useful for the observations of the members of the court on the scope of the order of 1940 notwithstanding the apparently limiting or qualifying words which are to be found in art. 1. On this subject **VISCOUNT CALDECOTE, C.J.**, said ([1943] 2 All E.R. 166):

"When the words of . . . art. 2 [of the order of 1940] are looked at, it will be seen that the article deals with trade disputes, that is, trade disputes within the meaning of the definition . . . I . . . think that these are trade disputes which cannot otherwise be determined either by the trade boards or by agreement. I further think that upon a proper review of this order, the jurisdiction of the National Arbitration Tribunal is not to be found in the introductory words of art. 1, but is to be ascertained from the order as a whole. If a trade dispute gets before the National Arbitration Tribunal regularly, it seems to me that jurisdiction to entertain the dispute in question follows as a matter of course. Let me look at art. 2 to see how the matter stands. Article 2 (1) of the order provides in the widest terms, quite unqualified terms, that: 'If any trade dispute exists or is apprehended, that dispute, if not otherwise determined, may be reported to the Minister . . . ' Article 2 (2) provides that the Minister shall—he must—refer the matter for settlement in accordance with any suitable means, suitable that is, in his opinion, for settling the dispute, which are the result of agreement, but it is still true to say that that applies to any trade dispute. Article 2 (3) says that failing suitable means, the Minister may refer the matter for settlement to the National Arbitration Tribunal, and art. 2 (4), under which I think the Minister was acting in this case, provides that when ' . . . steps have not resulted in a prompt settlement of the dispute, the Minister shall refer the dispute for settlement to the National Arbitration Tribunal . . . ' Those provisions seem to me quite plainly to give jurisdiction to the National Arbitration Tribunal to entertain a trade dispute which has been properly referred to it; otherwise it seems to me nonsense would be made of the articles to which I have referred, and I see no reason why any limitation of the right of the National Arbitration Tribunal should be supposed to exist, subject to this, that it must be a trade dispute, and it must be a trade

dispute which has come before the Arbitration Tribunal in accordance with the provisions to which I have referred. I think it is a much safer way of construing these provisions which create the tribunal and create the jurisdiction of the tribunal to refer to the operative words of the article as a whole, than to pay attention solely to the introductory words of art. 1, where the purpose of the establishment of the National Arbitration Tribunal is stated."

HUMPHREYS, J., after referring to the words, "For the purposes of settling trade disputes which cannot otherwise be determined", in art. 1 of the order, said (*ibid.*, 169):

"All I desire to say about that is that I am quite clearly of opinion, with my Lord, that whatever may be the effect of the introduction of these words, they cannot and do not limit the jurisdiction of the Minister or of the National Arbitration Tribunal . . . It is not the law of England that any tribunal set up by Parliament or by a statutory order can be prohibited from functioning, so long as it keeps within the terms of the statute or the order merely because there may be a different way, which that body cannot take, of arriving at the same result."

ASQUITH, J., dealt with the matter as follows (*ibid.*, 171):

"I agree with the judgments delivered by my Lords, and I would add only a few sentences on a single point, that is on the construction of the words 'which cannot otherwise be determined' in art. 1. It has been contended that those words mean 'for the determination of which no other machinery, whether statutory or otherwise, exists.' If they did mean that, in my view, that would not curtail the jurisdiction of the tribunal. But can they mean that? The order must be read as a whole. Article 2 (2) provides that where suitable means of settling the dispute exist by virtue of an agreement, the Minister has to resort to those means, and do so unsuccessfully, before he can refer the dispute to the tribunal. The words in art. 1 are, in my view, no more than an anticipation, in language perhaps unnecessarily wide, of this later provision. Indeed, I am not sure that the language is even unnecessarily wide, for while the words 'which cannot otherwise be determined' are capable of meaning 'which cannot be determined by any other means,' they are equally capable of meaning 'which cannot be determined by certain specific other means,' namely, the means specified below in art. 2 (2), and this is, in my view, their true meaning."

In *Rex v. National Arbitration Tribunal. Ex p. Midgley Harmer, Ltd.* (1), the facts were as follows. On May 23, 1945, the Minister referred to the tribunal a dispute arising out of a claim by some of the employees of Midgley Harmer, Ltd., for an increase of pay under the terms of an agreement, dated Aug. 9, 1944, between the Engineering and Allied Employers' National Federation and certain trade unions. Midgley Harmer, Ltd., who were not a party to that agreement, were paying their employees at a higher rate than that mentioned in the agreement, and they contended that the agreement did not, therefore, apply to them, that art. 5 of the order of 1940 did not make it apply, and that the tribunal had no jurisdiction to entertain the dispute. In his judgment, LORD GREENE, M.R., said ([1947] 1 All E.R. 197):

"The particulars of the dispute [referred to the tribunal by the Minister] were as follows: 'The dispute arises out of a claim made by the workmen

(1) [1947] 1 All E.R. 196.

mentioned in sched. 1 for increases in rates of pay under the terms of the agreement dated Aug. 9, 1944, between the Engineering and Allied Employers' National Federation and certain trade unions'."

After referring to the Defence (General) Regulations, 1939, reg. 58AA (1), and art. 1 and other provisions of the order of 1940, LORD GREENE, M.R., said (*ibid.*, 198):

"The only limit on the jurisdiction of the tribunal which appears there is that the matters that can be referred to it are confined to trade disputes. The definition of 'trade dispute' is to be found in art. 7 of the order."

He then read the definition and proceeded (*ibid.*):

"It appears to me to be really incapable of argument that, on the true construction of that definition, the present dispute is not a trade dispute within the meaning of the order. The employers, on the one hand, and the work-people, on the other, are in dispute or difference connected with the terms of employment, namely, the wages which the employees are to be paid. *Prima facie*, therefore, the matter is clearly a trade dispute in respect of which the National Arbitration Tribunal is the competent body to decide."

After a reference to art. 5 (1) of the order of 1940 and to the terms of the agreement of Aug. 9, 1944, LORD GREENE, M.R., said (*ibid.*, 199):

"The employers' case, as far as I understand it, is of this nature. They say that this agreement, which, for convenience, I shall call the national agreement, does not provide for increases to be given to female workers save in the case of those who are earning wages at rates mentioned in the agreement itself. It does not apply, they argue, and art. 5 does not make it applicable, to a case where the wages of the female workers are already above the scales mentioned in the agreement. Therefore, it is said, the National Arbitration Tribunal has no jurisdiction to take this controversy into consideration, in other words, it is not competent to the employees to say that this agreement applies to them and gives them the right, pursuant to art. 5 of the order of 1940, to the increase which they are demanding. The employees say that the effect of the agreement, on its true construction, as put into force against the employers under art. 5 of the order, gives to the female employees of Midgley Harmer, Ltd., the right to the increases mentioned, irrespective of what they were earning before. Why that does not constitute a trade dispute, I am afraid I am incapable of understanding."

MORTON, L.J., said (*ibid.*, 200):

"I agree. In the present case there is a dispute as to the meaning and effect of the agreement of Aug. 9, 1944. In my judgment, that is plainly a trade dispute within the definition contained in the Conditions of Employment and National Arbitration Order, 1940. The argument of counsel for the employers really amounts to this: 'The construction which my clients seek to place on the agreement of Aug. 9, 1944, is clearly right. If the National Arbitration Tribunal decides against my clients, it will be deciding wrongly. On Feb. 28, 1945, in a similar case, the National Arbitration Tribunal did decide wrongly, and I am apprehensive that they will do the same again.' That is not an objection to jurisdiction. It is merely a suggestion that the tribunal has misconstrued the agreement once and will misconstrue it again. It is not for this court to form any view about

the meaning of the agreement. That is entirely a matter for the tribunal, and I, of course, have formed no view one way or the other."

Counsel for the plaintiff says that the statement which I have cited from the judgment of LORD GODDARD, C.J., in *Ex p. Crowther* (1) was *obiter*. So it was, but it is a clear guide to what the views of LORD GODDARD, C.J., were on the point I am considering, and I accord to it the weight to which all his opinions, judicially expressed, are entitled. Then, as to the *Imperial Tobacco Co.* case (2), counsel for the plaintiff, while admitting that the observations of LORD CALDECOTE, C.J., and HUMPHREYS, J., are against him so far as they went, submits that they did not go far enough. Moreover, he placed some reliance (which I am afraid I do not myself appreciate) on the judgment of ASQUITH, J. With regard to *Ex p. Midgley Harmer, Ltd.* (3), counsel for the plaintiff said that the agreement which was there under discussion was a national agreement, and so, apparently, it was. It was pointed out, however, by counsel for the defendant corporation that LORD GREENE, M.R., said that the reference by the Minister was, not under art. 5 of the order of 1940, but under art. 2, and there seems to be no sufficient ground for supposing that this was not the case.

On the whole it seems to me that, although none of the cases to which I have referred is direct authority in support of the proposition that the National Arbitration Tribunal had jurisdiction to deal with the rights of employers and employees under private—as distinct from national—agreements of service, the judicial utterances which I have cited tend to suggest that my own view that the tribunal had such jurisdiction is correct, and no authority was cited to me to the contrary. I, accordingly, hold that, not only did the tribunal in fact decide the question which the plaintiff has sought to put in issue on the present originating summons, but it had full jurisdiction to do so. From this it follows, as counsel for the plaintiff conceded, that the matter is, as between the plaintiff and the defendant corporation, *res judicata*. In these circumstances the question of construction of the resolutions of Oct. 4, 1939, and Jan. 23, 1940, does not arise. It only remains for me to dismiss, for the above reasons, the originating summons, and I, accordingly, do so, with costs.

Declaration accordingly.

Solicitors: *Craigien, Hicks & Co.* (for the plaintiff); *Robins, Hay & Waters*, agents for *D. P. Heath*, town clerk, Birkenhead (for the corporation); *Solicitor, Ministry of Labour and National Service.*

(1) [1947] 2 All E.R. 693; [1948] 1 K.B. 424.

(2) [1943] 2 All E.R. 162.

(3) [1947] 1 All E.R. 196.

PROBATE, DIVORCE AND ADMIRALTY DIVISION

(WILLMER, J.)

Jan. 11, 1952

BAKER v. BAKER

Desertion—Parties living under same roof—House owned by both spouses—No allowance paid to wife—Provision of meals separately—Occupation of separate rooms—Other parts of house shared.

On an undefended petition for divorce brought by a husband against his wife on the ground of desertion it was proved that for more than three years before the presentation of the petition the parties had lived in the same house, which belonged to them both, but each occupied a separate bedroom and sitting-room and cooked their own food separately. During that time the husband had not paid any allowance to the wife. They shared the kitchen and the passages and other parts of the house and did not speak except for the business necessities of the day.

HELD: on these facts it could not be said that the parties had ceased to be one household and had become two separate households, and, therefore, desertion had not been proved.

Observations of DENNING, L.J., in *Hopes v. Hopes* (113 J.P. 15), applied.

UNDEFENDED PETITION by the husband for divorce on the ground of desertion. It was conceded that the parties lived in the same house throughout the three years before the presentation of the petition.

K. G. I. Jones for the husband.

WILLMER, J.: In this extremely difficult case relief is being sought on the ground of desertion, although it is conceded that the parties have continued throughout to live under the same roof. There have been cases of parties living under the same roof in which it has been held that they have been sufficiently separated to give ground for a decree for desertion, but those cases were exceptional and the facts were very strong.

I do not think I can do better than to refer to the words of DENNING, L.J., in *Hopes v. Hopes* (1) where he said (113 J.P. 15):

"That line [i.e., the line between desertion and gross neglect or chronic discord] is drawn at the point where the parties are living separately and apart. In cases where they are living under the same roof, that point is reached when they cease to be one household and become two households

I have to ask myself the question: Is it proved to my satisfaction that these two parties have ceased to be one household and have become two households? One reason why parties sometimes continue to live under the same roof, although separated, is that it is impossible to find accommodation elsewhere. If that is proved, it goes to negative the inference which would naturally be drawn from the fact of two people living in the same house—the inference that they are living together. Another fact which goes to negative the inference of cohabitation is that one party or the other has installed a lock on the door of his or her part of the house or taken some other step to cut off physical access between one party and the other.

Nothing of that sort has been proved in this case. I gave permission for the husband to be recalled so that he could explain why the parties were still living in the same house. The only explanation he offered was that the house belongs to both of them. No attempt has been made by either party to buy out the other.

(1) 113 J.P. 10; [1948] 2 All E.R. 920; [1949] P. 227.

It seems to me, therefore, that nothing has been proved to assist in rebutting the natural inference which is normally drawn from the fact of two people living in the same house. All that has been proved is that ever since the husband returned from the war the wife has been neglectful of him, as is instanced by the fact that on the night of his return from the war she put him in a separate room, which he has occupied ever since. The husband said that in March, 1948, he stopped paying his wife any allowance, and that since then he has bought and cooked his own food. I am asked to say that that brought about a *factum* of separation which was thereupon superimposed on an already existing intention to desert on the part of the wife. The husband says that since that date he has occupied and looked after his own bedroom and his own sitting-room. The wife also has her own bedroom and her own sitting-room. They do not speak except for the business necessities of the day, but, although they live in their separate rooms, they still continue to share the house. They share the kitchen. They do not very often meet there, because they try to avoid each other, but they share the passages, the stairs, and the other offices of the house.

When I ask myself the question whether, in those circumstances, I am satisfied that this outwardly one household has in fact become two households, I can only say that I am not satisfied. I find it impossible to say, therefore, that desertion for three years preceding the presentation of this petition has been proved to my satisfaction, and I must dismiss the petition.

Petition dismissed.

Solicitors: *Sidney Davidson & Co.* (for the husband).

G.F.L.B.

PROBATE, DIVORCE AND ADMIRALTY DIVISION

(LORD MERRIMAN, P., AND KARMINSKI, J.)

Jan. 15, 1952

ABSON v. ABSON

Justices—Husband and wife—Maintenance—Discharge of order—Adultery by wife after dissolution of marriage—Preferable jurisdiction of Divorce Court—Summary Jurisdiction (Married Women) Act, 1895 (58 and 59 Vict., c. 39), s. 7.

On Nov. 29, 1944, justices granted the wife an order for maintenance against her husband on the ground of his desertion. In September, 1948, she obtained a decree for the dissolution of her marriage on the ground of the same desertion. In February, 1951, the husband applied to the justices, under s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, to discharge the order of Nov. 29, 1944, on the ground that within the preceding twelve months the wife had committed adultery with one R., a married man. The justices found that the wife had had sexual intercourse with R., but doubted whether this constituted an "act of adultery" within s. 7, she at the material time having ceased to be a married woman. Treating that question as irrelevant, they discharged the order on financial grounds.

HELD: in the circumstances of the case the justices should have exercised their discretion to discharge the order on the ground that the wife should be left to seek an order for maintenance in the Divorce Court since that court was free to consider all the circumstances of the case and to assess the true bearing of every part of the wife's conduct, whereas, under s. 7 of the Act of 1895, on proof that the wife had committed an act of adultery the justices were bound forthwith to discharge the order.

Per KARMINSKI, J.: The true test whether, when the wife had intercourse with R., she committed adultery, she being then unmarried, is: "Was she then dishonouring or defiling her own marriage bed or that of R? She, being a single woman, could not be dishonouring or defiling her own marriage bed, but R. was married, and, if she had intercourse with him, she was dishonouring or defiling the marriage bed of him and his wife, and so she was committing adultery. The justices having found that she had had sexual intercourse with R., it followed that they had, in effect, found that she had committed an act of adultery within s. 7.

APPEAL by the wife against an order of justices for the city of Bradford dated Feb. 21, 1951, whereby they discharged an order, made on Nov. 29, 1944, awarding her maintenance on the ground of her husband's desertion.

J. Stirling for the wife.

The husband was not represented.

LORD MERRIMAN, P.: This appeal by a wife against the decision of the Bradford city justices to discharge an order made in her favour raises an important question. On Nov. 29, 1944, the wife obtained from the justices an order against her husband on the ground of his desertion for 25s. a week for her own maintenance, and 5s. a week for that of the child of the marriage, the custody of whom they gave to the wife. There was no resumption of cohabitation, and in due course the wife was granted a decree of divorce on the ground of the same desertion, the decree being made absolute in September, 1948. From that moment, therefore, she ceased to be the wife of the respondent, but the justices' order was allowed to stand, and she continued under it to draw her money and to have custody of the child without any other order being made by the Divorce Court. On Feb. 21, 1951, the husband made an application to the Bradford justices to discharge their order on the ground that within the preceding twelve months the wife had committed an act of adultery with a man named Rayner. Any date within the twelve months manifestly was long after that on which she had ceased to be the wife of the husband, and at the very outset of the case it was suggested that the justices had no jurisdiction to discharge the order because she had ceased to be a married woman, and, therefore, the provision with regard to the forfeiture by a married woman of her order, which appears in the Summary Jurisdiction (Married Women) Act, 1895, s. 7, no longer applied. That argument, however, was rejected by this court in *Bragg v. Bragg* (1), and the decision in that case that, divorce notwithstanding, justices still have a discretion to exercise their functions with regard to a pre-existing order has repeatedly been approved. The matter is fairly summarised in a judgment of this court in *Prest v. Prest* (2). That case raised a different point—one in connexion with the resumption of cohabitation—but we there reviewed the authorities in which *Bragg v. Bragg* (1) had been dealt with, and I said:

"The effect of the decision in *Bragg v. Bragg* (1) is that it is a matter of discretion whether or not, in the circumstances of any given case, [justices should] discharge, as against a wife whose marriage has subsequently been dissolved, an order made while she was the wife of the husband. This court, however, has said over and over again that that is not a discretion to be exercised arbitrarily or capriciously. It must be exercised judicially."

I then referred to *Mezger v. Mezger* (3), *Kirk v. Kirk* (4), and *Wood v. Wood* (5), on the facts of which this court decided expressly or impliedly that the discretion

(1) [1925] P. 20.

(2) 114 J.P. 1; [1949] 2 All E.R. 790; [1950] P. 63.

(3) 100 J.P. 475; [1936] 3 All E.R. 130; [1937] P. 19.

(4) 111 J.P. 435; [1947] 2 All E.R. 118.

(5) [1949] W.N. 59.

was one which could only be exercised by discharging the order under the Summary Jurisdiction Acts.

I think that the same reasoning applies to the present case. Rayner is a married man. It was argued in the court below that, as the wife had divorced her husband, she was no longer a married woman within the meaning of s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, and she was not, therefore, a person who could commit adultery within the meaning of that section, or, to put it another way, that "act of adultery" for the purpose of s. 7 of the Act of 1895 meant something different from an act of adultery which, for example, would be charged against her as a woman named in a divorce suit between Mrs. Rayner and her husband. Pressed to its logical conclusion, that might cut at the root of the decision in *Bragg v. Bragg* (1). However, counsel for the wife has reserved the right to argue that a divorced wife cannot commit adultery with a married man within the meaning of the Summary Jurisdiction Acts.

Counsel for the wife, while maintaining his right to dispute the facts elsewhere, did not, for the purposes of this appeal, contend that there was not sufficient evidence in law to entitle the justices to find as they did. If the facts do convict the wife of adultery within the meaning of s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, there is no more to be said about the matter, because the obligation to set aside the order is absolute. I think, however, that, without resolving the conundrum whether there are two different meanings of "adultery" for the purposes of the Divorce Court and courts of summary jurisdiction, it can be decided whether this is a proper case, within the decisions in *Bragg v. Bragg* (1) and the cases in which *Bragg v. Bragg* (1) has been followed, for the justices to exercise their discretion whether or not to keep this order alive. If the wife, having obtained a decree of divorce against her husband, had exercised her right to apply for maintenance in the Divorce Court, it would be a matter of judicial consideration whether or not in all the circumstances it was a case in which an order should be made in the first instance, or, whether, if an order had been made in the first instance, it should be cancelled or modified in any way because of the course of conduct which was alleged against her. As between the two tribunals—the Divorce Court and the court of summary jurisdiction—it seems to me that there cannot be any reasonable doubt which should be preferred, and that is the one which has a perfectly free jurisdiction to go into all the circumstances of the case and to assess deliberately the true bearing of every part of the divorced wife's conduct on the questions of maintenance and the custody of the child. I hope that, in spite of the lapse of three years, it is not too late for that tribunal to deal with the matter having regard to the fact that an order has been in existence and has been acted on in the meanwhile until this summons by the husband was served.

The justices have found that, quite apart from whether there had been the commission of any act of adultery on the part of the wife within s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, this was clearly a case for setting aside the order of 1944 on financial grounds. My view of the matter is that the moment this issue appeared, at the very outset of the case, the justices should have said: "This is not a case in which we should keep this order alive. Never mind what the facts are proved to be. There is a charge of adultery against one who was a married woman when the order was obtained and is now a divorced woman. That raises all the complications inherent in the line of authorities beginning with *Bragg v. Bragg* (1)." They should have said that this is essentially

a case, within that line of authorities, in which the court should exercise its discretion to discharge the order and leave the wife to her remedies in the Divorce Court. They did not take that view, but it is a view which is open to us if we think that they did not properly exercise their discretion within the meaning of the *Bragg v. Bragg* (1) line of authorities. The result is the same. In my opinion, the appeal must be dismissed and the order discharged, but for the reasons I have given. The wife is left to whatever remedies she may have under the ordinary law of divorce.

KARMINSKI, J.: I agree. The justices found that sexual intercourse had taken place between the wife and Rayner. At the time this intercourse took place it was clear that the wife was no longer a married woman, but was a feme sole because in September, 1948, she had been granted by this court a decree absolute dissolving her marriage with her husband. It was argued that in those circumstances she could not be guilty of adultery within the meaning of s. 7 of the Summary Jurisdiction (Married Women) Act, 1895. I think it is useful to look at s. 3 of the Matrimonial Causes Act, 1950, which provides for making an adulterer a co-respondent and, by sub-s. (2), directs that when a petition for divorce is presented by a wife on the ground of adultery the court may, if it thinks fit, direct that the person with whom the husband is alleged to have committed adultery be made a respondent. Neither sub-section of that section makes it a term that the alleged adulterer should himself or herself be a married person. In my view, the true test is this. When the wife took part in an act of sexual intercourse with Rayner, was she then dishonouring or defiling her own marriage bed or that of the man with whom the intercourse took place? Clearly, so far as the wife was concerned, she could not be defiling or dishonouring her own marriage bed, because, as a single woman, she had no marriage bed and no married home, but Rayner was a married man, and, if she had sexual intercourse with him, she was committing adultery, because she was defiling or dishonouring the marriage bed of Mr. and Mrs. Rayner. The justices having found that sexual intercourse did take place, it must follow that that sexual intercourse amounted to adultery on the part of the wife.

In a case of this kind the High Court is the suitable tribunal to investigate a claim by the wife for maintenance. The fact that a wife has committed adultery is not an absolute bar to the court awarding her maintenance on the dissolution of her marriage. The Matrimonial Causes Act, 1950, s. 19 (2), lays down what facts the court is to take into consideration regarding that matter, and among them is the conduct of the parties. In many cases the wife asks for maintenance although she herself has committed adultery during the marriage and for that reason has had to seek the exercise of the discretion of the court. That factor has to be taken into consideration. Similarly, it has been held that the conduct of the parties after decree must also be considered, and there is no doubt that adultery by a petitioner wife after the dissolution of her marriage is also a matter for consideration. The High Court, therefore, has the power and the duty to consider the conduct of the parties, whereas, under s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, once the wife has committed adultery, her order for maintenance must be discharged. In my view, this is a case where the wife should seek permission of the Divorce Court to lodge her application for maintenance although some three years have elapsed since she ought to have done so. At the time of her decree, however, she was in the enjoyment of an order under which payments were being made. All these factors will, no

(1) [1925] P. 20.

doubt, be taken into account by the court to which she applies for leave to make her application out of time. I agree that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Ward, Bowie & Co.*, agents for *James A. Lee & Priestley*, Bradford (for the wife). G.F.L.B.

COURT OF APPEAL

(SIR RAYMOND EVERSHED, M.R., JENKINS AND HODSON, L.JJ.)

Jan. 15, 1952

YOUNG v. BUCKLES

Building Control—Architect's fees—Inclusion in amount authorised by licence—Work in excess of licensed amount—Recovery by architect of fees—Defence (General) Regulations, 1939 (S.R. & O., 1939, No. 927), reg. 56A, (4), (6).

Services as an architect are not "services used for the purpose of a building operation" within the meaning of the Defence (General) Regulations, reg. 56A, and, therefore, fees payable to architects or other professional persons in connection with building operations are not to be included in the amount of expenditure permitted by the building licence.

The plaintiff, an architect, claimed from the defendant, the owner of a social club, professional charges amounting to £48 10s. in connection with building work done on the club premises. A building licence permitting an expenditure of £525 was obtained, but work exceeding that sum was carried out. At the date of the issue of the plaint the defendant had spent £482. It was contended for the defendant (i) that, by virtue of the Defence Regulations, 1939, reg. 56A (4), architects' fees formed part of the amount permitted by the licence to be spent on building work and that any exceeding of the amount allowed by the licence made the whole contract illegal and the fees irrecoverable, and (ii) that an architect who supervised the carrying out of an illegal building contract committed an offence under para. 6 of reg. 56A, and, therefore, could not recover his fees.

HELD: even assuming that the licensed amount included the plaintiff's fees, at the date of the issue of the plaint payment of the amount claimed, added to the sums already paid, would not have caused the amount limited by the licence to be exceeded; illegality only attached to the excess over the licensed amount, and a contract was only illegal in so far as it involved a claim for payment of a sum larger than that for which the licence was granted; and, therefore, when the plaintiff issued his plaint he had a cause of action, was not a party to an illegal contract, and was entitled to the sum claimed.

Dennis & Co., Ltd. v. Munn ([1949] 1 All E.R. 616), applied.

APPEAL by the defendant from a decision of His Honour JUDGE CROSTHWAITE, sitting at Liverpool County Court, dated Sept. 17, 1951, giving judgment for the plaintiff for £48 10s. on a claim for professional fees and work done as an architect in connection with building operations at the defendant's premises. By her defence the defendant denied that she had ever appointed the plaintiff to act for her in a professional capacity and said that the work was carried out by building contractors. In the Court of Appeal these defences were not raised, and the defendant relied on the contention that the plaintiff was not entitled to recover £48 10s. for professional services since the licence in respect of the building work covered fees for architects and surveyors, work had been done in excess of the £525 for which the licence was granted, and, therefore, the plaintiff's claim was unenforceable.

Yours for the defendant.

Rigg for the plaintiff.

SIR RAYMOND EVERSHED, M.R.: The defendant, Mrs. Alice Buckles, at all material dates appears to have been the proprietor of premises known as the Boundary Social Club, Blundellsands. The present proceedings arise out of work which was done on those premises on her behalf, and, in particular, relate to certain fees charged by the plaintiff as architect and surveyor for his professional services in connection with that work.

The writ was issued on Jan. 30, 1951. The claim is for £48 10s., and on the writ there is an indorsement, giving the following particulars:

"To professional charges for preparing full set of plans for the alterations to the club, preparing specifications, submitting the same to local authority and obtaining their approval, supervising the carrying out of the said work, registering the club with the Central Land Board *re* future development charges, and receiving their acknowledgment, and work done by the plaintiff as a surveyor."

Further particulars were asked of the charges, and they were given. From those particulars it appears that the sum of £48 10s. is, in fact, made up of three items—(i) A charge of eight per cent. on £525 for preparing and drawing plans for the alterations and obtaining licences, £42. The figure of £525 is the amount for which a licence was granted by the Ministry of Works. (ii) A charge of £2 2s. for making an application under the Town and Country Planning Act, 1947, about development charges. (iii) A charge of £4 8s., representing five per cent. on a sum of £88 8s. paid for supplying and fixing a beer pump. The value of the work which eventually was carried out, and for which the plaintiff from time to time granted certificates, was in all some £700, £175 at least in excess of the £525 which was the amount for which a licence was given under the Defence (General) Regulations, 1939. Because of that excess the defendant contends that the plaintiff is now disabled from making any claim.

There have been several cases before the courts of this character. I cannot look altogether sympathetically on a case made by persons who take the benefit of work done on their premises, and then plead illegality under the Defence (General) Regulations so that they may have that benefit without the obligation of paying for it. Still, that is beside the point, for Parliament has made it plain that, save with the appropriate licences, it is not lawful to spend more than certain sums of money on building operations, and Parliament has taken that step to conserve for the national good such resources in the way of building labour and materials as are available. If people embark on building operations which offend against the prohibition which Parliament has imposed, the general principle of law must be applied, *viz.*, that a person making a claim based on a contract tainted with illegality cannot recover in these courts.

The question here is whether the claim for professional charges which the plaintiff has made falls within that description, *i.e.*, whether it is tainted with illegality consisting of an infringement of the Defence (General) Regulations. The licence was granted for £525, and before the plaintiff and the defendant came into any kind of commercial contact the defendant appears to have engaged the services of another professional man as a surveyor to advise her on the work which should be done to improve the attractions of the club. That gentleman's estimate came to a sum of over £1,000. For that no licence was obtainable, and the whole matter fell to the ground. Later, the defendant appears to have made the acquaintance of the plaintiff and also of a building firm which has the unusual name of the El Kebir Building Co., and the plaintiff and this firm thought that the work could be done for £535. The matter proceeded on that footing, an application for a licence for that sum was made by the plaintiff,

and the Ministry of Works in due course issued a licence for £525, dated Dec. 16, 1948, and addressed to the defendant. According to the evidence the work carried out cost £700 or more, but at the date when the plaint was issued, namely, Jan. 30, 1951, the plaintiff confined his claim, as appears from the nature of it (subject to one point with which I will deal later) to his professional charges in respect of the sum of £525 for which a licence had been obtained. At that date the defendant had paid £425 to the builders and, perhaps, £47 to the electricians. It is clear, therefore, that she had not then paid more than the total of those two sums, £472, and that, if the plaintiff's claim had been met, she still would not have paid more than £525 in all.

The significance of those facts appears to me to be as follows. The cases which have been cited to us, such as *Dennis & Co., Ltd. v. Munn* (1), in this court, and the Scottish case of *Jamieson v. Watt's Trustee* (2), seem to show that where under the Defence (General) Regulations work is licensed to cost a certain figure, £x, but work is, in fact, carried out so that the total cost or value is £x plus £y, the illegality only attaches to the excess. In other words, the contract is only illegal in so far as it involves a claim for a payment of a larger figure than that for which the licence was granted. If that be right, then at the date when the plaint was issued (and assuming in favour of the defendant the point which I must come to discuss presently, namely, that the £525 comprehended the fees due to the architect) it could not be said that the amount claimed plus any sum already paid involved any excess of the amount allowed by the licence. If after the plaintiff issued the plaint the defendant paid other persons, it would be a strange result that the plaintiff's position was thereby worsened. For these reasons, therefore, on any view of it, it seems to me that when the plaintiff issued his plaint he had a good cause of action and was entitled to the sum which he claimed without involving himself in being party to, or enforcing, a contract which had then become illegal.

If that view be not correct, it becomes necessary to consider the main point which counsel for the defendant argued both here and below, namely, that fees payable to architects or other professional persons in connection with building operations are included in and cannot be paid so as to create an excess over the sum for which the Ministry of Works may grant a licence. Such a result would be surprising if it were correct. A man may engage the services of professional men to advise him in regard to his property in many ways. As JENKINS, L.J., pointed out in the argument, a man may engage the services of the most eminent architect in the country to design for him a palace or a cathedral, and the obvious fact that no licence would be granted for that work could not affect the right of the architect to claim payment for professional services. Similarly, a man who is considering doing work on his property may well have occasion to take the advice of a lawyer whether the work, if carried out in a particular way, would be liable to involve the owner in any difficulties with neighbours, e.g., as regards infringements of rights of way. It is easy to imagine many cases in which a building owner may take professional advice in regard to work which he contemplates carrying out, for which services, in the ordinary way, he would be liable to pay the proper professional fees, and it would be surprising if the Defence (General) Regulations had the effect that professional charges of that character which a building owner had rendered himself liable to pay were deemed to be covered by the amount of any licence granted, so that officials of the Ministry of Works were in a position to say how much was to be paid to lawyers, surveyors, and other professional men

(1) [1949] 1 All E.R. 616; [1949] 2 K.B. 327.

(2) 1950 S.C. 265.

for the services they had rendered. Yet such, as I understand it, is the contention of the defendant.

The question must turn on the effect of the language used in the relevant part of reg. 56A (4), which is as follows:

"In computing, for the purposes of this regulation, the cost of an operation or of any work, regard shall be had to the value of any goods or services used for the purposes thereof, notwithstanding that the provision thereof did not involve the expenditure of money solely or primarily for the purpose of that particular operation or work."

It is the contention of the defendant that, according to the ordinary usage of our tongue, the work done by the plaintiff as specified in the particulars of claim was "services", and so far I agree. It is further said that they were "services used for the purposes of the operation." It is at that point that I disagree. If it had been intended by Parliament that in computing the cost of an operation there should be included the amount of fees for services rendered in connection therewith, that, or something like it, would have been the obvious form of words to use. The language is quite different. It does not say that there must be taken into account the amount of the charges. It says that regard shall be had to the value of the services. The services are not described as services rendered in connection with the operation, but as services used for the purposes of the operation. Applying the test of ordinary sense to the language, it seems to me that the services rendered by the plaintiff to the defendant in this case cannot be described as services used for the purposes of a building operation. Nor do I think that the earlier words "regard shall be had to the value of those services" are in the least apt if the intention was that an architect's normal scale of fees should be included in the amount of the licence. I think the clue to the sense and intendment of this paragraph is found in the following words:

"notwithstanding that the provision of the goods and services did not involve the expenditure of money solely or primarily for the purposes of that particular operation or work."

To my mind, but without attempting an exhaustive statement of what the paragraph includes, it is directed in the ordinary way to cases in which, for the purpose of executing the work, use is made of some goods or services which are also being made use of for the purpose of some other work so that there might be no separate charge as regards the particular work for the use of those goods or services and it is necessary to have regard to the value of those services so far as they are used for the purpose in hand. That is borne out by the fact that in reg. 56A (6) special provision is made for dealing with a professional man, as distinct from the builder, who may be party to the execution of some illegal contract, specific reference being made to architects, engineers, and other persons employed in an advisory or supervisory capacity in connection with the execution of the operation, a form of words which is obviously suitable and appropriate to professional men and which is absent from reg. 56A (4). In my judgment, therefore, the fees which the plaintiff was properly entitled to charge in respect of the work specified in the specification are not to be taken as having been comprehended in the licence figure of £525. I do not think that the licence itself is consistent with the other point of view.

That, however, is not quite the end of the matter. I have already said that the figure of £48 10s. includes the item of five per cent. on £88 8s. 4d., the cost of supplying and fixing a beer pump. It might be said in view of the particulars that that was a percentage charge on something, on the face of it, additional to the figure of £525, and, therefore, on the face of it, tainted with the

illegality of an excess over the licence figure. The answer, I think, to that suggestion is that there is no sufficient evidence on which the court could come to any view on that matter save only this, that, according to the specification which I have read, the beer pump was included in the total specification for which the licence for £525 was granted. So that on the evidence it would appear that the plaintiff charged eight per cent. on the whole work, including the installation of the beer pump, and an additional five per cent. on the beer pump itself. Whether he was entitled to charge two percentages on that particular item must, perhaps, be open to doubt, though no one has challenged that fact or figure, and, therefore, it must be taken that the sum charged, £48 10s., was a proper charge. Indeed, the county court judge stated in his judgment that the charges as such were proper, and no one has suggested the contrary. The sum is small in any case, and, therefore, I need take no further time on it.

There remains a final point. Even though the argument based on reg. 56A (4), which the defendant has put before us, is erroneous, it might be said that this plaintiff had, as the architect concerned, supervised the execution of the work, granting certificates in respect of it considerably in excess of the licence figure, and, therefore, must be taken as having been, if not a party to the illegality, at least in some measure responsible for the doing of work which was illegal, and that, having so involved himself in an illegality, he cannot now come to the court and make any claim in respect of any professional services which he rendered to the defendant. The present case, however, seems to me to be of a different character. In the first place, I have considerable doubt whether the point was ever taken in the court below, and I have no doubt that it is not taken in the notice of appeal. It certainly was not pleaded. Those are matters which might be cured, and if there was an obvious illegality it might be the duty of the court to take the point in any case, but it is noted here that the charge which the plaintiff has made is limited to the percentage charges in relation only to such a sum as was properly covered by the licence. It is true that he may have issued certificates for other work, but there is no evidence of the circumstances in which that additional work was done, save only the statement of the plaintiff himself that the defendant ordered this additional work. Even if this matter were open on the pleadings and had been taken in the notice of appeal or otherwise, I am of opinion that it could not avail the defendant, having regard to the fact that the plaintiff has put on his claim a limitation to a professional charge relating exclusively to so much of the work identified in terms of cost as was covered by the licence. The result is that I think the judge correctly concluded this matter.

On the facts in this case, there being no evidence with regard to the circumstances in which the excess came to be put in hand, I think that is a correct and concise summary of the situation. I think the plaintiff was entitled to recover his professional charges, and the defendant had no just or lawful excuse for declining to pay them. I think the appeal ought to be dismissed.

JENKINS, L.J.: I agree that this appeal should fail on both the grounds stated by SIR RAYMOND EVERSHED, M.R. I may add that the construction placed by my Lord on reg. 56A (4)—the construction which excludes from the application of the regulation to such matters as professional fees paid to an architect or surveyor employed by a building owner—finds some support in the form of the application for a licence provided by the Ministry of Works and in the form of the licence itself. The application contains para. 4 which says: "Full description of work for which licence is required (attach specification if available)", and that is answered: "As per attached specification".

The specification itself contains no reference at all to any surveyor's fees payable by the building owner. The next relevant paragraph in the application is para. 7: "Estimated cost of proposed work (include value of all materials new or second-hand) and labour", and that is answered "£535". The direction in para. 7 of the application thus, on the face of it, is not designed to elicit from the applicant anything more than the cost of the proposed work, including the value of all materials, new or second-hand, and labour. If it had been intended that the figure inserted in answer to para. 7 was to provide something for an architect's or a surveyor's fees payable by the building owner, I think it would inevitably have been necessary to include a reference to those matters in the form. As it is, I think the £535 was a figure put forward as the cost of the matters mentioned in para. 7 and nothing else. As to the licence, this was expressed to be granted to carry out the work mentioned at a total cost not exceeding £525 in accordance with the application dated Dec. 1, 1948, and specification and drawing submitted therewith. The authorised cost was £525 as compared with a sum of £535 asked for in the application, but it is plain, so far as the documents are concerned, that the licence purported to authorise the £525 as representing the estimated cost of the proposed work, including the value of all materials, new or second-hand, and labour, but not including any such matter as any fees which the building owner might pay to an architect or to a surveyor. I agree that the appeal fails.

HODSON, L.J.: The authorities to which our attention has been drawn, namely, *Brightman & Co. v. Tate* (1), *Dennis & Co., Ltd. v. Munn* (2), and *Jamieson v. Watt's Trustee* (3), indicate that, in so far as the licence is not exceeded, the contract may be legal. At the date of the issue of the plaint it appears that the sum of £525 had not been exceeded, and there was room for the plaintiff's claim of £48 10s. to be met before the total of £525 was reached. In those circumstances, there is an answer to the defendant's case. If that conclusion is wrong, it is necessary to consider the construction of reg. 56A (4) of the Defence (General) Regulations, 1939. Counsel for the defendant argued that the words "regard shall be had to the value of any goods or services used for the purposes thereof" (that is, the cost of a building operation) must be taken to cover the professional services of a surveyor. Taken in isolation, I think there is force in that argument, but when the whole of the regulation is read, particularly sub-para. (1), which deals with the execution of the operation, sub-para. (2), which refers to the carrying out of the work or maintenance work on a building, and sub-para. (6), which draws a distinction between the work of architects or other persons employed in an advisory capacity and persons who actually execute the operation, it seems to me that the contention of the plaintiff is right. Regulation 56A (4) is not apt to bring into the range of control some new type of work, and the object is to extend the control of the total cost of the operation to work done in the operation concerned, and in that connection the value of the goods and services used has to be regarded. I agree that the appeal fails.

Appeal dismissed.

Solicitors: *Pitchard, Englefield & Co.*, agents for *M. J. Canter & Co.*, Liverpool (for the defendant); *Woodcock, Ryland & Co.*, agents for *Grundy & Cartwright*, Manchester (for the plaintiff).

F.G.

(1) [1919] 1 K.B. 463.

(2) [1949] 1 All E.R. 616; [1949] 2 K.B. 327.

(3) 1950 S.C. 265.

PROBATE, DIVORCE AND ADMIRALTY DIVISION

(LORD MERRIMAN, P., AND KARMINSKI, J.)

Jan. 16, 17, 1952

STRINGER v. STRINGER

Justices—Husband and wife—Maintenance—Wilful neglect to maintain—Consensual separation—No agreement as to maintenance—Liability of husband.

The husband and wife parted by mutual consent in November, 1946, and from that date the husband had not paid the wife any maintenance, nor had she demanded any maintenance until July 17, 1951, when she issued a summons for wilful neglect to maintain.

HELD: proof of a consensual separation of spouses without any agreement by the parties regarding the maintenance of the wife is sufficient to rebut the common law presumption that a husband is liable to maintain his wife, and to that extent the onus is on the wife to prove liability by the husband: observation by HILL, J., in *Papadopoulos v. Papadopoulos* (94 J.P. 39) not applied; and, in the absence of any demand by the wife before she took out the summons, the justices were not justified in making a maintenance order: *Tulip v. Tulip* ([1951] 2 All E.R. 91) distinguished.

APPEAL by the husband against an order of Luton justices dated Oct. 1, 1951, whereby they found that he had wilfully neglected to provide reasonable maintenance for his wife and awarded her 10s. a week.

C. T. Reeve for the husband.

K. B. Campbell for the wife.

LORD MERRIMAN, P.: This is a husband's appeal from an order made by the Luton justices on Oct. 1, 1951, whereby they found that he had wilfully neglected to provide reasonable maintenance for his wife as from July 17, 1951, and awarded the wife 10s. a week. The wife had also charged the husband with desertion. The justices dismissed that summons. Before them the husband opposed an order on the ground that, so far from his having deserted the wife at the time of the parting, she had deserted him. The justices did not find that. They came to the conclusion that there was no desertion on the part of either spouse. The husband had left because the wife said he had better go, but he had been just as willing to part as she had been. In other words, the justices found that it was a simple case of a consensual separation, and it is. This case has been rightly fought by the husband on the basis that that finding could not be challenged. I need not read all the reasoning which the justices have set out justifying their conclusion which was:

"While, therefore, there was no evidence of a deliberate agreement to separate, we took the view that in all the circumstances of the case there had been a separation by mutual consent, and that neither party had been guilty of desertion in law. This state of affairs, it seemed to us, did not relieve the husband of his duty to provide reasonable maintenance for his wife and we decided on the evidence that the husband had been guilty of wilful neglect in that respect."

I think that this is an important case, because it brings to a head a point about which there is surprisingly little authority. Counsel for the wife called our attention to a passage in the judgment of HILL, J., sitting in this court with LORD MERRIVALE, P., in *Papadopoulos v. Papadopoulos* (1), and submitted that, where there is a separation of this sort, with nothing said one way or the other

(1) 94 J.P. 39; [1930] P. 55.

about the question of maintenance, the common law liability of a husband to maintain his wife subsists unless the contrary is shown, that it is for the husband to show the contrary, and, if the matter is left in doubt and he does not maintain his wife, that there is evidence on which the court can find that he has been guilty of wilful neglect. I think it is necessary to preface the reading of this passage, by saying that in that case it was hardly necessary to lay down any proposition about where the onus of proof lay. The main issue was whether there had been a good and lawful marriage in this country according to the laws of England between a Cypriot and a Frenchwoman, and, if so, what was the effect of certain proceedings in the Cypriot court at Nicosia purporting to set aside that marriage by a decree by consent and on certain monetary terms. On an investigation of the law on that subject the court unanimously came to the conclusion that the whole of the proceedings in the Cypriot court were worthless and that the attempt by the husband to repudiate the marriage in this country could not succeed. That was the view that LORD MERRIVALE, P., took. I doubt whether it was necessary to say much more, but HILL, J., expressed the same thing in other words, in the course of which he said:

"The question is whether the husband neglected to provide maintenance. He did not in fact provide maintenance. Neglect means failure in a duty to provide maintenance, and the question is whether he was under a duty to maintain the wife. *Prima facie* he was. That is the common law of England, and it was for the husband to show that he was excused from that duty. A husband may show it in various ways. For instance, he may show that his wife has been guilty of adultery, neither condoned nor connived at, nor condoned to by the husband, or that she had deserted him and was continuing to desert him, or that there is a subsisting binding contract performed and not repudiated by him that she should not claim maintenance otherwise than as provided by the contract, or that a court of competent jurisdiction in a proceeding between husband and wife had already determined the rights of the wife in respect of maintenance and that he had fulfilled the obligations so imposed on him."

With regard to the last two matters, which had been put forward in that case, if there ever had been a subsisting binding contract, it certainly had not been performed and it had been repudiated, and there was no determination by a court of competent jurisdiction of the rights of the parties, for the court unanimously held that the Cypriot court had no jurisdiction to do what it did. Finally, and in relation to the whole of the group of examples, HILL, J., said:

"But the onus is on the husband to prove the excuse."

From that it is sought to deduce, with regard to a matter which was not mentioned by HILL, J., that, if there is a mere agreement to separate and nothing is said about maintenance, it is for the husband to prove affirmatively that there was a positive agreement that there should be no maintenance and otherwise his common law liability subsists. We have to consider whether that is sound.

Consciously or unconsciously the justices applied that passage to this case—very likely consciously for it is reasonably clear that they framed their decision either on reading this passage or on some reference to it in a text-book, for their finding is stated very much on those lines. It is right to say that the passage has been cited with approval more than once. I am not going through all the various cases, but I think that on investigation it will appear that it has been cited as a very concise and accurate statement of some of the instances, as HILL, J., himself called them, in which a husband has a complete answer to a demand

for maintenance. It was, for example, referred to as being a sufficient guidance for this court by a court composed of BATESON, J., and LANGTON, J., in *Markovitch v. Markovitch* (1). It was cited by this court, composed of BUCKNILL, J., and HENN COLLINS, J., in *Richardson v. Richardson* (2) as an answer to a claim for maintenance on the part of a wife who was in a state of desertion. BUCKNILL, L.J., in *Winnan v. Winnan* (3), referred to it in his judgment, the question being whether there was any difference between active desertion and constructive desertion for the purposes of applying the proposition stated by HILL, J. In the course of that judgment ([1948] 2 All E.R. 865), BUCKNILL, L.J., also cited his decision in *Richardson v. Richardson* (2). I think it may fairly be said that it was used in these cases, without exception, for the purpose of supporting the proposition that these various instances were all absolute defences to a claim for maintenance on the ground of wilful neglect to maintain, and that the court was not thinking in particular whether in any given instance the burden of proof lay on the one side or the other. If the fact was established, wherever the burden of proof lay, it was decisive. At any rate, I think it is open to us to say that, unimpeachable as the passage itself is, the one sentence: "But the onus is on the husband to prove the excuse", was not necessary to the decision of that case. It is just as well to bear in mind that the question where the onus of proof lies may be of very minor importance, for it will be recalled that in *Churchman v. Churchman* (4), in giving the judgment of the Court of Appeal, I said ([1945] 2 All E.R. 195), even with regard to the deliberate change of wording effected by the Matrimonial Causes Act, 1937, in s. 178 of the Supreme Court of Judicature (Consolidation) Act, 1925:

"After all, as DU PARCQ, L.J., pointed out during the argument, the incidence of the burden of proof as a determining factor of the whole case is only of importance if the tribunal finds the evidence, *pro* and *con*, so evenly balanced that it can come to no definite conclusion. Then the onus will determine the matter. In *Robins v. National Trust Co.* (5) VISCOUNT DUNEDIN said ([1927] A.C. 520): 'But if the tribunal after hearing and weighing the evidence comes to a determinate conclusion the onus has nothing to do with it and need not be further considered'."

That brings me to consider this question in relation to a particular instance which was not one of those mentioned by HILL, J., in *Papadopoulos v. Papadopoulos* (6), and that is the instance of a consensual separation where nothing is said, one way or the other, about maintenance. About that, this court made a pronouncement in *Baker v. Baker* (7) where I said:

"There is no law involved in this case; it is merely an application of the principle that, if a wife is living separate and apart from her husband, it is not enough for her to give evidence that her husband had money and that she needed maintenance. The question is: What was the nature of the parting? If the wife can prove desertion, she is, of course, entitled to a maintenance order on that ground. If the separation was consensual, then, if she can prove—and Mr. Crispin accepted that the onus was on the wife—that this was on the basis, expressed or implied, that the husband undertook to be responsible for her maintenance, she is entitled either to the agreed

(1) (1934), 98 J.P. 282.

(2) (1942), 167 L.T. 260.

(3) [1948] 2 All E.R. 862; [1949] P. 174.

(4) [1945] 2 All E.R. 190; [1945] P. 44.

(5) [1927] A.C. 515.

(6) 94 J.P. 39; [1930] P. 55.

(7) (1949), 66 (pt. 1) T.L.R. 81.

amount (if there was an agreed amount) or to a reasonable amount under the section, although she is living apart from her husband. But unless she can show, where the separation was consensual, that the husband had accepted the liability, expressed or implied, to maintain her, she has no case at all."

I need not read the rest of the judgment, which merely dealt with the application of that principle to the facts of the case, but I should like to say that PEARCE, J., agreed with what had been said. He said:

"In this case desertion has been negatived, and the wife's evidence makes it clear that there was here a separation by consent. If by her evidence she could establish that there was expressed or implied in that separation a continuing liability on the husband's part to support her, this order could stand, but her evidence has not done this, and therefore, in my opinion, there has not been wilful neglect to maintain, and the appeal should be allowed."

There is no doubt that it does appear, subject to the qualification I have already mentioned as to the importance or unimportance of the onus of proof, that there the burden is placed differently—at any rate in this particular class of case—from the way in which it is stated in *Papadopoulos v. Papadopoulos* (1).

In the case now before us five years elapsed after the parting in the course of which, until this summons was served on the husband, he received, neither by word of mouth nor by writing, at the time of the parting or at any subsequent time, any request from his wife for maintenance. She had kept herself, and made it clear that she meant to go on keeping herself. She had done nothing to disabuse her husband's mind of the idea that that was a state of things with which she was content until she issued this summons asserting that he had been guilty of wilful neglect to provide reasonable maintenance. I ask myself, wherever the onus may be, what is the inference which should be drawn here from that, and in the circumstances of this case I can only say that the proper inference is that during the time between November, 1946, and the date on which this summons was issued this was a consensual separation without any sort of stipulation that the husband should provide maintenance for the wife, and I do not think it is of any importance to pursue further the question of the onus of proof. In justice to this court, however, I ought to point out that the Court of Appeal have plainly accepted our statement of the matter as correct. I do not suggest that *Papadopoulos v. Papadopoulos* (1) was brought to their notice or that it was suggested that there was any importance in the issue on whom lay the onus, but in *Chapman v. Chapman* (2), an appeal from a decision of this court consisting of WALLINGTON, J., sitting with me, heard by ASQUITH, L.J., BIRKETT, L.J., and HARMAN, J., the Court of Appeal gave approval to the passage to which I have just referred. I do not ignore the point that in one sense the approval may be said to be *obiter*, because the case was one in which, contrary to the finding of the justices, we had taken the view that the husband had, in effect, (a) consented to a separation, and (b) consented in circumstances which implied an undertaking to maintain his wife. The Court of Appeal said we were wrong on the point of fact in coming to the conclusion that there had been a consensual separation, and in that sense the second point did not arise, though they also expressed the opinion, which followed almost necessarily from what they had already said about the nature of the parting, that, even if it could be said to be consensual, it certainly was not consensual on the basis that the husband undertook the obligation to maintain his wife. The facts of the case are of no

(1) 94 J.P. 39; [1930] P. 55.

(2) (unrep.).

importance whatever. What is of importance is that in two passages in the judgment of ASQUITH, L.J., which was concurred in by HARMAN, J., he first of all stated the proposition that summonses for desertion and wilful neglect to maintain do not necessarily stand or fall together and then continued:

"Often two such summonses do so, and if the wife fails on desertion she automatically fails on wilful neglect to maintain, but that is not necessarily or inevitably so. Sometimes, where, for instance the evidence is that the separation was consensual she may fail on desertion and win on maintenance; in cases, that is, where the consensus impliedly includes a term that the wife should be entitled to some support from the husband."

He concludes his judgment with this passage:

"In those circumstances [*i.e.*, of that case], with great respect, I am of opinion that the inference of consensus cannot be supported; and, if it cannot, then there can be no possible claim to maintenance. There is, indeed, authority which has been cited to us, a case called *Baker v. Baker* (1) . . . which decides very clearly that, even where a separation is admittedly consensual, it has to be shown either that there was an expressed agreement to pay maintenance or that such an agreement must be implied from the circumstances. In this case I think that the conclusion that there was a consensus at all cannot be supported, and therefore the other point does not really arise."

As I have already indicated, in the opening passage of his judgment, ASQUITH, L.J., accepted the statement of principle the affirmation of which he very briefly repeated in the passage I have just read. BIRKETT, L.J., said:

"I agree with what my Lord has said, and I do not think for my own part that, on the evidence before the justices and the evidence before the Divisional Court, this inference of consensus can really be supported; but I would just like to add a final word: Assuming for the moment that there had been, in the circumstances of this case, a consensual separation I do not think it by any means follows that an inference is to be drawn that it was upon the basis that attached to it should be an undertaking to provide maintenance. I think, on the contrary, almost everything in the case would appear to be against it . . . It does not look, as I say, upon the face of it, that any such inference could be drawn, even if there had been anything in the nature of an agreement to separate, that it should be upon the terms that he would provide maintenance."

I am prepared, supported and reinforced by that authority, to stand by what we said in *Baker v. Baker* (1). But, as I have said already, I do so with the feeling that in the present case it does not matter in the least which way the onus is, because on the facts, in my opinion, there is only one inference that can be drawn. The only way in which the case can be put is to say that the common law liability raises a presumption which must be rebutted, but what is necessary to rebut it? It does not advance the argument any further because, plainly, where there is an agreement to separate, with a specific agreement, whether for a nominal or a substantial payment, that agreement is substituted for the presumption. Why is it necessary, therefore, to say that there must be an express agreement before there can be any inference that there is to be no maintenance, if all the facts point to an inference that that must be the condition on which the parties separated? However, if the question of onus arises, I think that I prefer,

(1) (1949), 66 (pt. 1) T.L.R. 81.

and, indeed, I am now bound to prefer, the judgment of this court in *Baker v. Baker* (1), with the meed of approval which has been accorded to it in the Court of Appeal, to the inference to be drawn from one sentence in an otherwise unimpeachable passage in the judgment of HILL, J., in *Papadopoulos v. Papadopoulos* (2).

That brings me to the only other point. It is said that, while what I have said may well be so, nevertheless, by taking out this summons the wife has re-opened the whole matter and it is still open to the court to say that an order should be made on the ground of wilful neglect to maintain. In support of that *Tulip v. Tulip* (3) was cited. All that the Court of Appeal there decided was, on the basis of the decision of this court in *Morton v. Morton* (4), that the existence of a separation agreement was not a bar to the jurisdiction of the justices, however high was the evidential value of the agreement itself, of its punctual performance, and so on, in guiding the justices in the exercise of their jurisdiction. In remitting the case for a decision on the issue whether the husband had been guilty of wilful neglect to maintain, considerable emphasis was laid on the fact that before any proceedings were taken the wife had put forward by letter a reasoned claim for re-consideration of the amount payable to her under the agreement which there existed, on the ground that circumstances, not only financial, but also physical, had changed very much for the worse for her, and financially very much in favour of the husband. It was not a case in which it was held that, without any warning, a man could be charged with wilful neglect to provide reasonable maintenance when, without any complaint before the issue of the summons, he had done everything that he was bound to do under the terms of the separation. I can see nothing here which justifies the wife, at the time when she issued this summons, in asserting that her husband had been guilty of this offence. It does not follow that the husband will be able to take up that position indefinitely. It is not for us to lay down what steps it may be appropriate for the wife to take to put herself in a position to claim maintenance, but it must be acknowledged that it is easier for her to do so in a case like this where there was no formal agreement to live separate and apart and no particular terms were specified as to the conditions on which they were to live apart. The result is that, in my opinion, on the facts as they stood when the justices decided this case, there was no ground for making this order. The appeal will, therefore, be allowed and the order set aside.

KARMINSKI, J.: I agree. The justices found as a fact that there had been a separation by mutual consent, and that neither party had, therefore, been guilty of desertion. With that finding of fact there has been no quarrel, and it is clearly supported by the evidence, but the justices also said:

"This state of affairs, it seemed to us, did not relieve the husband of his duty to provide reasonable maintenance for his wife and we decided on the evidence that the husband had been guilty of wilful neglect in that respect."

It is possible that this paragraph is founded on a misapprehension as to the matter set out in *STONE'S JUSTICES' MANUAL*, 83rd ed., pp. 1092 to 1093. The only matter about which I have found any difficulty arises from some observations to which my Lord has referred in the judgment of HILL, J., in *Papadopoulos v. Papadopoulos* (2), where he gave a number of examples whereby a husband

(1) (1949), 66 (pt. 1) T.L.R. 81.

(2) 94 J.P. 39; [1930] P. 55.

(3) [1951] 2 All E.R. 91; [1951] P. 378.

(4) 106 J.P. 139; [1942] 1 All E.R. 273.

was excused from his common law duty to maintain his wife. I do not think for a moment that HILL, J., meant that list of instances to be conclusive. He was merely exemplifying his proposition, because, after the words to which my Lord has referred—"But the onus is on the husband to prove the excuse"—he set out what in that case the particular excuses were supposed to be—namely that the husband was excused (i) by a decree of a court in Nicosia, and (ii) by an agreement between the spouses embodied in the decree of that court. HILL, J., was not considering what we have to consider here—a case where the spouses have separated by mutual consent and there has been no desertion on either side. On a careful consideration of the decision in *Papadopoulos v. Papadopoulos* (1) together with the more recent decision by this court, in *Baker v. Baker* (2) I can find no inconsistency. The principle as set out in *Baker v. Baker* (2) is simply that where the separation is consensual the wife must show that the husband had accepted the liability, expressed or implied, to maintain her—otherwise she has no case to put forward on neglect to maintain. That decision, as my Lord pointed out, has recently been approved by the Court of Appeal. I find that on the facts in the present case before the justices the wife did not prove any agreement, expressed or implied, that her husband would maintain her, and for that reason I agree that this appeal succeeds.

Appeal allowed.

Solicitors: *Peacock & Goddard*, agents for *Cooke & Sons*, Luton (for the husband); *Machin & Co.*, Luton (for the wife). G.F.L.B.

- (1) 94 J.P. 39; [1930] P. 55.
(2) (1949), 66 (pt. 1) T.L.R. 81.

PROBATE, DIVORCE AND ADMIRALTY DIVISION

(LORD MERRIMAN, P., AND KARMINSKI, J.)

Jan. 21, 1952

POOLEY v. POOLEY

Husband and Wife—Maintenance order—Discharge of order—Petition for divorce—Application for alimony pendente lite.

Where a wife who has in her favour a maintenance order made by a magistrate includes in a petition for divorce a claim for alimony *pendente lite*, she may apply to the magistrate to discharge his order since she cannot have two concurrent maintenance orders, and the jurisdiction of the magistrate in dealing with her application does not conflict with the jurisdiction of the Divorce Court.

APPEAL by the wife against a decision of the Leeds stipendiary magistrate, dated Sept. 27, 1951, dismissing her application to discharge a maintenance order made in her favour on Nov. 26, 1946, on the ground of her husband's desertion. On Sept. 29, 1950, the wife had filed a petition for divorce on the same ground and in her petition she applied for alimony *pendente lite*, and she sought the discharge of the magistrate's order to avoid the existence of two concurrent orders for maintenance. The magistrate held that he had no jurisdiction in the matter because there was a petition pending in the Divorce Court.

D. H. Robson for the wife.

Stogdon for the husband.

LORD MERRIMAN, P.: In a reasoned judgment the magistrate says that he does not think that he has jurisdiction to discharge this order because

the wife's petition is pending in the Divorce Court and a magistrate should not exercise any concurrent jurisdiction while a suit is so pending. He took the view that even the act of considering whether or not to discharge the order would be some infringement of the jurisdiction of the Divorce Court, albeit that it was being done for the express purpose of avoiding a conflict of jurisdiction between the two courts, and that the proper way to deal with the situation, if the wife chose not to apply for an increase of the amount of maintenance under the recent amendment of the law effected by the Married Women (Maintenance) Act, 1949, s. 1, whereby the maximum sum was increased from £2 to £5, was to go to the Divorce Court and apply for maintenance pending suit, disclose that the order of 1946 subsisted, ask the Divorce Court to adjourn for twenty-eight days, and, if within that time the magistrate had set the order aside, then go back to the Divorce Court and proceed for the alimony. I find this line of reasoning wholly unconvincing. In my opinion, there was no answer to the wife's application to discharge the order. A wife who has taken divorce proceedings—*a fortiori*, if, as in this case, she has incorporated in her petition a claim for alimony pending suit instead of making it the subject of a separate application—is entitled to pursue her rights for maintenance in the Divorce Court, provided that she gets rid of any existing order, for she cannot have concurrent orders in her favour in two courts.

Great reliance was placed on the line of decisions beginning with *Bragg v. Bragg* (1), which decides that even after dissolution of marriage magistrates may, in a proper case, exercise their functions with reference to a pre-existing order for maintenance. In the Divorce Court a wife can obtain an order for a secured provision of maintenance. Moreover, there is no limit, within reason, to the amount of maintenance that may be awarded by the High Court, whereas there is a statutory limit in the case of a court of summary jurisdiction. So, plainly, at the time when a divorce is granted, it may be much more advantageous for a wife, merely from the financial point of view, to get provision for her maintenance through the Divorce Court. It is elementary that she is entitled to an absolutely free hand regarding maintenance, subject always to two things—to the fact that, if she decides to apply to the Divorce Court, she must get rid of an existing order in the magistrates' court, and to the right of the magistrates' court, in a proper case, to treat the mere fact of divorce itself as being sufficient to justify the magistrates in bringing the order to an end, leaving her to whatever her rights may be in the Divorce Court.

Counsel for the husband has not attempted to dispute that, but he says that a different principle is to be applied with regard to alimony pending suit. In one sense there is a difference in that the decree may never be made at all. But that is the wife's risk, and I cannot see that it is anything else but a question whether she makes her choice sooner rather than later. She is just as much entitled to ask for her alimony pending suit in the Divorce Court as she is to ask for her ultimate maintenance in the Divorce Court, and I am completely unimpressed by the difficulty which the magistrate felt—that, by giving his mind to her wish to get rid of the order in her own favour while there is a petition on the file of the Divorce Court, he must actually be exercising a conflicting jurisdiction. Even if the course which the magistrate suggests is the proper solution of the difficulty, namely, making an application to the Divorce Court, having it adjourned for a specified period, and then going back to the magistrate's court to get the order set aside, the matter is still pending in both courts. There is no escape from it unless one thing is done, namely, that she goes to the

(1) [1925] P. 20.

magistrate before presenting her petition. In my opinion, there is no obligation on her to do that. Underlying the whole of this case there has been a momentary forgetfulness of the fact that by getting rid of the whole order and with it the finding of desertion, she is not doing the harm which the magistrate thought she would be doing to her case. The petition alleges that the desertion, held to have begun in 1946, had continued until the presentation of the petition. Even on the view that getting rid of the order could do her harm by cancelling a subsisting finding of desertion, it could not affect the issue before the court, provided it is done after the petition is filed. It has never been hinted or suggested, within my experience, that she is obliged to get rid of the order before presenting her petition. I must not be taken to be suggesting that, even if she did so, it would make any difference to the reality of the matter, but, for what it is worth, she would be getting rid of the advantage of being able to plead a subsisting order, and she is not obliged to do that.

I think the whole of the suggestion that there is a conflict between the two jurisdictions in getting rid, pending suit, of the old order, is a fallacy. The truth and the reality of the matter is that the application is made to ensure there is no overlapping between the two. That cannot be said of the class of case in which this court has set its face against an overlap of the jurisdictions—cases, for example, where there is an attempt to raise a charge of adultery in the magistrates' court when the same issue is pending in the Divorce Court or there is pending in the Divorce Court a proceeding in which that same issue could properly be raised. This case does not come within any measurable distance of that sort of principle. In my opinion, the magistrate should have set this order aside on the wife's application so that the matter might proceed under her petition, and I think that we ought to do the same. In so far as it is a matter of discretion, which I doubt since the wife herself wishes to have the order set aside, I feel no difficulty about exercising our discretion in the matter, because I think the reasons the magistrate has given for the exercise of the discretion in the way he exercised it are unsound. In my opinion, this appeal must be allowed.

KARMINSKI, J.: I agree. I am not able to share the difficulty of the magistrate. In cases where a wife has obtained an order from magistrates and then petitions in the High Court for divorce, there is likely to be, at any rate for a time, a certain concurrence of jurisdiction, and in cases of desertion the only way out of this position would be for the wife to apply to the magistrates to discharge her order before she files her petition. That step may be fraught with dangers for her—dangers which might not inevitably be fatal—because she would be weakening the evidence in her hand that the desertion had continued up to the presentation of the petition. Short of an active conflict on the financial side in a case of this kind I see no difficulty in the matter. The magistrate has suggested two alternatives which seem to me to be more likely to be causes of two concurrent exercises of jurisdiction than the order which was sought from him, because he suggested that the wife, though she had a petition pending in the High Court, should apply to the magistrates' court for an increase in the existing order, or, alternatively, that she should apply to the registrar in the Divorce Court for alimony pending suit and then ask to have that application adjourned for a time so that she could go back to the magistrate to discharge the existing order. The second alternative, without avoiding the possibility of concurrent jurisdiction, seems to me to be really a more roundabout way of approaching the matter than the wife has already undertaken. So far as the question of principle is concerned here, I entirely agree with LORD MERRIMAN, P., that the matter is of some interest, because the rights of a wife in the Divorce

Court are not only greater than, but are also distinct from, those which she can obtain in a court of summary jurisdiction. There is no limit to the amount which the Divorce Court can order. It is further of importance to recall that the Divorce Court can order secured payments for life, in proper cases, whereas no such provision exists in the court of summary jurisdiction.

Appeal allowed.

Solicitors: *Ludlow, Head & Walter*, agents for *Wiley, Hargrave & Co.*, Leeds (for the wife); *Louis Godlove & Co.*, Leeds (for the husband).

G.F.L.B.

PROBATE, DIVORCE AND ADMIRALTY DIVISION

(LORD MERRIMAN, P., AND KARMINSKI, J.)

Jan. 23, 1952

CASEY v. CASEY

Desertion—Termination—Offer by deserting husband to resume cohabitation—Wife asked to return to look after children.

On Sept. 20, 1951, the husband constructively deserted the wife by refusing, without any reasonable cause, to allow her to enter the house. A fortnight later he asked her to return to him as he wanted her to look after the children, but he said that he would not sleep with her and would not take her out. The parties were both in early middle age and there was no physical or moral impediment why they should not live together as man and wife in the full sense of the words.

HELD: in the circumstances the offer was not a genuine offer to resume cohabitation which the wife was bound to accept.

APPEAL by the wife against the dismissal, on Oct. 26, 1951, by Preston justices of a summons taken out by her alleging desertion and wilful neglect to provide reasonable maintenance by her husband. The justices held that the husband had made an offer to resume cohabitation which the wife had unjustifiably refused.

A. C. Goodall (E. L. Gardner with him) for the wife.

E. Rawdon Smith for the husband.

LORD MERRIMAN, P.: This is a wife's appeal from the dismissal by justices of charges of desertion and wilful neglect to provide reasonable maintenance as from Sept. 20, 1951, brought by her against her husband.

It is clear that this has been an uneasy marriage for some time, the separation which occurred on Sept. 20, 1951, being the fourth since 1948. On Sept. 20, 1951, the wife went to a neighbour's house. The husband objected to her friendship with this neighbour, so, when the wife came back after a few minutes, he shut her out of the house and said: "You stay there until I get your bag", or words to that effect. The wife returned to the neighbour's house and stayed there. The justices have found, in effect, that the husband's conduct on this occasion may have amounted to desertion. They do not find positively that it did, but they assume that it may have. They say: "However that may be, there has been an offer by the husband to take the wife back which ought to have been accepted, and, therefore, the wife has no case, either for desertion or wilful neglect to maintain." I am bound to say that I think that a matter of comparatively minor importance has been treated as the most decisive factor, and a matter of considerable importance has been dealt with as one of very

little weight. It is, of course, impossible to object to the use of words such as "making a genuine offer", and "being bound to accept a genuine offer", or "not being bound to accept an offer because it is not genuine", because these phrases have been hallowed by the highest authority over and over again. Nevertheless, it is often appropriate to test these words by what is, I think, a simpler phrase which touches more nearly the essence of the matter: "Was the one spouse or the other ready and willing to resume cohabitation, whatever, in the circumstances of the particular case, may be the appropriate meaning of 'cohabitation'?" It is that aspect of the matter which has been pushed into the background, and the only thing which has been put in the foreground is whether or not the husband was entitled to insist, as unquestionably he did insist, that, if his wife came back to live with him, she should cease the association with this neighbour to which he objected.

The matter comes to a head when one reads the first three paragraphs of the justices' reasons. They say that they were of opinion that

"while the husband, in turning the wife from home on Sept. 20, may have been guilty of conduct amounting to desertion, his subsequent request for her to return, made prior to the proceedings and repeated again in court, terminated any desertion there might be. We considered the husband's attitude towards his wife, and, while this left much to be desired, having regard to the past history of the case, it was unquestionably his insistence that the wife should give up an association which had been a constant source of friction which led to the present trouble, and, in our view, this was not unreasonable. We think that the offer that the husband made, taking all things into consideration, ought to have been accepted."

The occasion to which they refer was when the husband met the wife in the street on Oct. 5, 1951, and made some suggestion about her coming back. She said: "On what terms?", and the matter on which he principally insisted was that he would be "the boss" in future. The wife's evidence about it is this:

"I met him in the street and he asked me if I would come home. I asked him the terms. He said: 'What terms?' I said: 'Do you take me out, as [the probation officer] suggested?' He said: 'No'. I said: 'What are the conditions?' He said: 'I am the boss'. I said: 'You take me out?' He said: 'No. I do not want you. I only want you to come and look after the children'."

He made it plain that among the things in which he was insisting on being the boss was forbidding her to go to the neighbour's house, and the magistrates say that his insistence about that was not unreasonable. I will assume that that is so, but the far larger question is whether he ever offered to resume cohabitation at all.

The husband was subjected to a severe cross-examination, in the course of which it was made plain beyond the slightest doubt that what he was saying was: "I neither meant, nor do I intend now, that she should come back and live with me as my wife. I will not sleep with her. I will not take her out. All I really want her for is to come back because it is her place to look after the children". The care of the children was, of course, a very important thing, but to be a nurse to the children is not the whole of married life, and, in pushing into the background and dismissing as of secondary importance what is the fundamental question in the case, the justices have seriously misdirected themselves. It is clear that that has been the husband's attitude throughout, and I think the justices are right in assuming that he deserted the wife on Sept. 20. But neither then, nor when they met to talk it over, nor in his

attitude in court, nor by the things he said over and over again in the witness-box, did he exhibit any intention whatever to resume cohabitation in the only sense in which that word can be used in this case, namely, treating the woman as his wife in the full sense of the word. This is not a case where there is any sort of physical impediment or any moral reason for refusing to live with her as man and wife. He is in the forties and she in the thirties, and they have a young family. It would need very strong evidence of some overriding reason or obstacle to persuade me that in those circumstances a reconciliation which did not involve readiness and willingness to cohabit in the ordinary sense of the word is a reconciliation which this wife is bound to accept. I think the justices have been misled, by exaggerating the importance of the very minor matter of the wife's association with the neighbour, into ignoring the fundamental point. That being so, I think this appeal must be allowed. I do not think that anything is to be gained by a fresh hearing, because I think the facts are perfectly plain and that the wife's summons should be merely remitted to the magistrates on the question of the appropriate amount, with which we are not able to deal unless we can do so by consent.

KARMINSKI, J.: I agree.

Appeal allowed.

Solicitors: *R. Norton Ellen*, agent for *Dorothy Heaton, Pape & Co.*, Preston (for the wife); *Gregory, Roucliffe & Co.*, agents for *William Preston & Co.*, Preston (for the husband).
G.F.L.B.

KING'S BENCH DIVISION

(LORD GODDARD, C.J., BYRNE AND PARKER, JJ.)

Jan. 24, 1952

BOTTOMLEY v. HARRISON

Public Health — Statutory nuisance — Abatement notice — "Owner" — Person "receiving the rackrent . . . as agent or trustee"—Secretary receiving cheques for rent and paying them into owner's account—Public Health Act, 1936 (26 Geo. 5 and 1 Edw. 8, c. 49), s. 93, s. 343 (1).

By s. 343 (1) of the Public Health Act, 1936, "owner" for the purposes of the Act "means the person for the time being receiving the rackrent of the premises . . . whether on his own account or as agent or trustee for any other person, or who would so receive the same if those premises were let at a rackrent."

Premises were owned by one V., who was abroad at the material time, and the respondent was employed as secretary in his office. The tenant paid her rent by cheque made out to V. and used to get back her rent book with initials which were said to be the respondent's against the relevant entry. The tenant also produced a letter signed by the respondent "per pro F. V." in which the respondent said that she was dealing with V's. property during his absence. An abatement notice was served by the local authority on the respondent as owner of the premises. The justices dismissed the complaint, holding that the abatement notice could not properly be served on the respondent.

HELD, that the respondent, by merely receiving the tenant's cheque and paying it into V's. bank, did not receive the rent as agent or trustee for V., and was not the "owner" of the premises within the meaning of s. 343 (1) of the Act. The position might have been different if the money had been paid into the respondent's account, or if, during V's. absence, she had had the handling of the money and not merely the cheque. On the facts before them, the justices had, therefore, come to a right decision.

CASE STATED by Lancashire justices.

At a court of summary jurisdiction at Morecambe a complaint under s. 94 (1) of the Public Health Act, 1936, was preferred by the appellant, Bottomley, the deputy town clerk on behalf of the Morecambe and Heysham Urban District Council, alleging that a nuisance existed at 18 Norton Avenue, Heysham, and that the respondent, Miss Harrison, had failed to comply with an abatement notice served on her by the local authority under s. 93 of the Act as the person by whose act or default the nuisance existed. By s. 93 of the Act an abatement notice is to be served "on the person by whose act, default or sufferance the nuisance arises or continues, or, if that person cannot be found, on the owner or occupier of the premises on which the nuisance arises . . ." By s. 343 (1): "'Owner' means the person for the time being receiving the rackrent of the premises . . . whether on his own account or as agent or trustee for any other person." The premises were owned by one Varley, who was abroad at the material time, and the respondent was employed by him in his office as secretary. The tenant, a Mrs. Harmsworth, paid her rent by cheque made out to Varley, and she used to get her rent book back with initials against it which were said to be the respondent's. The cheque was paid by the respondent into Varley's banking account. The tenant also produced a letter in which the respondent said: "Dear Madam, I am dealing with Mr. Varley's property during his absence. On examining his records I find that the amount previously paid to you for garage and water is £3 per annum. Why is this amount now altered to £3 1s. 6d. ? Yours truly, per pro F. Varley, M. Harrison." On one occasion the respondent called at the house to inspect the defects.

On the part of the appellant it was contended that the respondent was the "owner" within the meaning of s. 343 (1) of the Act of 1936, because she was a person receiving the rent of the property and acting as agent of the owner. For the respondent it was contended that (i) she was not the person by whose sufferance the nuisance continued, (ii) she had never been a rent collector, (iii) she was a secretary in the office of the owner, and in the course of her duties she received the cheques for the rent of the property, made payable to Mr. Varley, and initialled the rent-book by way of receipt. The justices being of the opinion that the respondent was not the owner of the property within the meaning of s. 343 (1), dismissed the information. The appellant appealed to the Divisional Court.

Threlfall for the appellant.

Ruttle for the respondent.

LORD GODDARD, C.J.: This is a Case stated by justices for the county of Lancaster. It seems that the local authority of Morecambe and Heysham found that a dwelling-house, 18, Norton Avenue, Heysham, was in a condition which, they contended, was a nuisance. The property is occupied by a Mrs. Harmsworth and is owned by a Mr. Varley. Mr. Varley was out of England at all material times. Mrs. Harmsworth paid her rent by cheque, which she made out to Mr. Varley, and she used to get back her rent-book with some initials against it, said to be the initials of the respondent, Miss Harrison. Mrs. Harmsworth produced a letter from the respondent which reads as follows:

"Dear Madam, I am dealing with Mr. Varley's property during his absence. On examining his records I find that the amount previously paid to you for garage and water is £3 per annum. Why is this amount now altered to £3 1s. 6d. ? Yours truly, per pro F. Varley, M. Harrison."

Section 93 of the Public Health Act, 1936, provides:

"Where a local authority are satisfied of the existence of a statutory nuisance, they shall serve a notice (hereafter in this Act referred to as 'an abatement notice') on the person by whose act, default or sufferance the nuisance arises or continues, or, if that person cannot be found, on the owner or occupier of the premises on which the nuisance arises, requiring him to abate the nuisance and to execute such works and take such steps as may be necessary for that purpose: Provided that—(a) where the nuisance arises from any defect of a structural character, the notice shall be served on the owner of the premises . . ."

For the purposes of this Act "owner" is defined in s. 343 (1) as follows:

"'Owner' means the person for the time being receiving the rackrent of the premises in connection with which the word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if those premises were let at a rackrent."

The local authority served an abatement notice on the respondent as the owner of the premises within that definition. The only evidence that the respondent was the owner was that Mrs. Harmsworth paid her rent by cheque in favour of Mr. Varley, and the respondent received the cheque, which is a negotiable instrument, and paid it into the bank who would credit Mr. Varley with it. I cannot see that in those circumstances it can be said that the respondent received the rent as agent or trustee for Mr. Varley. She received it as a conduit pipe between Mrs. Harmsworth and Mr. Varley's account at the bank. If the money had been paid into the respondent's account, or if it could be proved there was some arrangement under which, during Mr. Varley's absence, she had the handling of the money and not merely the cheque, it might have been different, but the only evidence here is that Mrs. Harmsworth paid her rent to Mr. Varley. The fact that the respondent sent back the rent-book with her initials on it, indicating that the rent had been paid to Mr. Varley and not her, is neither here nor there. I think the justices were right in holding that there was no evidence before them on which they could hold that the respondent was the owner of the premises. For these reasons the appeal must be dismissed.

BYRNE, J.: I agree.

PARKER, J.: I agree.

Appeal dismissed.

Solicitors: *Gibson & Weldon*, agents for *Roger Rose*, town clerk, Morecambe and Heysham (for the appellant); *Hiscott, Troughton & Page*, agents for *Bannister, Bates & Son*, Morecambe and Heysham (for the respondent).

T.R.F.B.

KING'S BENCH DIVISION

(LORD GODDARD, C.J., BYRNE AND PARKER, JJ.)

Jan. 24, 1952

MEEK v. POWELL

Quarter Sessions—Appeal from court of summary jurisdiction—Power of quarter sessions to amend summons—Conviction under repealed statute—Summary Jurisdiction Act, 1879 (42 and 43 Vict., c. 49), s. 31 (1) (vii) (as substituted by Summary Jurisdiction (Appeals) Act, 1933 (23 and 24 Geo. 5, c. 38), s. 1)—Food and Drugs (Milk, Dairies and Artificial Cream) Act, 1950 (14 Geo. 6, c. 35), s. 36 (3).

The defendant was convicted by a court of summary jurisdiction on informations which charged him with unlawfully selling for human consumption milk to which had been added water, contrary to s. 24 (1) of the Food and Drugs Act, 1938, and he appealed to quarter sessions on the ground that the summonses were defective in that they charged him with an offence contrary to a section of a statute which had been repealed. At the date of the conviction s. 24 (1) of the Act of 1938 had been repealed and had been replaced *ipsissimis verbis* by s. 9 (1) of the Food and Drugs (Milk, Dairies and Artificial Cream) Act, 1950. Quarter sessions held that they had no power to entertain an application by the prosecutor to be allowed to amend the summonses and quashed the convictions. On appeal by the prosecutor to the Divisional Court,

HELD: that, though a court of summary jurisdiction in such a case, if the defendant did not object, could direct a summons to be amended forthwith, or adjourn the case for amendment, or dismiss the summons and leave the prosecution to charge the offence under the correct enactment on a fresh summons, it had no power to amend a summons after conviction; that under s. 31 (1) (vii) of the Summary Jurisdiction Act, 1879 (as substituted by s. 1 of the Summary Jurisdiction (Appeals) Act, 1933) quarter sessions could exercise only any power which the court of summary jurisdiction might have exercised; and that, therefore, quarter sessions had no power to amend the summonses after conviction and were bound to quash the convictions.

Per PARKER, J.: "Any document" in s. 36 (3) of the Act of 1950 refers to a document existing at the time when the Act was passed and not to a document which came into existence subsequently. The reference in the summonses to s. 24 (1) of the Act of 1938 was not, therefore, to be construed as a reference to s. 9 (1) of the Act of 1950.

CASE STATED by Monmouthshire Quarter Sessions.

At a court of summary jurisdiction sitting at Pontypool on informations laid by the appellant, a sampling officer for and on behalf of the Pontypool Urban District Council, the respondent was convicted that on May 10, 1951, he unlawfully sold to the Milk Marketing Board for human consumption milk to which had been added water contrary to the Food and Drugs Act, 1938, s. 24 (1). The respondent appealed to quarter sessions, where it was contended on his behalf that the informations were incurably defective and the convictions were bad because at the time of the convictions s. 24 (1) of the Act of 1938 had been repealed, though it had been re-enacted *ipsissimis verbis* by the Food and Drugs (Milk, Dairies and Artificial Cream) Act, 1950, s. 9 (1). It was contended on behalf of the appellant (i) that the informations were saved by s. 36 (3) of the Act of 1950, and that no amendment of the informations was necessary; (ii) that by pleading to the informations before the court of summary jurisdiction the respondent had waived his right to object to the form or substance thereof; and (iii) that the point taken was unmeritorious, that the court of summary jurisdiction would, in the proper and judicial exercise of its discretion, have amended the informations, had objection been taken to them, and that quarter sessions had the like power and discretion. Quarter sessions held that they had

no power to allow amendment after conviction, allowed the respondent's appeal, and quashed the convictions. The appellant appealed to the Divisional Court.

Arthur G. Davies for the appellant.

P. E. Underwood for the respondent.

LORD GODDARD, C.J.: BYRNE, J., will give the first judgment.

BYRNE, J.: This is a Case stated by Monmouthshire Quarter Sessions, who allowed the respondent's appeal against two convictions by a court of summary jurisdiction sitting at Pontypool on informations charging that, on May 10, 1951, at Pontypool he unlawfully sold to the Milk Marketing Board for human consumption milk to which had been added water, contrary to the Food and Drugs Act, 1938, s. 24 (1). On Oct. 26, 1950, s. 24 (1) of the Act of 1938 was repealed. The position, therefore, was that a conviction was recorded by petty sessions under a section of a statute which had been repealed. The very words of s. 24 (1) of the Act of 1938 were reproduced in s. 9 (1) of the Food and Drugs (Milk, Dairies and Artificial Cream) Act, 1950.

If a person is charged before a court of summary jurisdiction under a repealed statute, the justices, if the defendant does not object, can amend the summons forthwith, or they can adjourn the case so that the summons may be amended, putting the prosecution on whatever terms they please as the result of the adjournment, or they can dismiss the summons, leaving it to the prosecution in a fresh summons to charge the offence under the correct statute. The powers of quarter sessions on appeal are to be found in the Summary Jurisdiction (Appeals) Act, 1933, which, by s. 1, substitutes the following provisions of the Summary Jurisdiction Act, 1879, s. 31 (1) (vii):

"Quarter sessions may by their order confirm, reverse or vary the decision of the court of summary jurisdiction, or may remit the matter with their opinion thereon to a court of summary jurisdiction acting for the same petty sessional division or place as the court by whom the decision appealed against was given, or may make such other order in the matter as they think just, and by such order exercise any power which the court of summary jurisdiction might have exercised; and any order made by quarter sessions shall have the like effect and may be enforced in the like manner as if it had been made by the court of summary jurisdiction. Quarter sessions may also make such order as to costs to be paid by either party as they think just."

The question here is whether that paragraph of the sub-section does any more than enable quarter sessions on the hearing of an appeal to exercise the power which the justices in petty sessions would have had of amending on the terms I have indicated a summons which was defective. In my view, s. 31 (1) (vii) gives no power to quarter sessions to exercise a power which petty sessions could not exercise. Once petty sessions have recorded a conviction on a summons they have no power thereafter to amend the summons. The power of quarter sessions is derived through that of the justices at petty sessions, and it follows that quarter sessions have no power to amend a summons in such circumstances. What was before quarter sessions in the present case was a conviction under a repealed enactment, and, in my view, that could not be cured under any statutory authority that the justices at quarter sessions had. I am of opinion that this appeal should be dismissed.

LORD GODDARD, C.J.: I agree. If this had been a conviction on an indictment which charged an offence under the wrong section, it seems clear

that the Court of Criminal Appeal would have had no option but to quash the conviction although the court of trial would have had power to amend the indictment. That seems to have been decided in *Rez v. Taylor* (1) where there was pleaded in an indictment a section which had been repealed and replaced by a section in a later Act and the Court of Criminal Appeal held that, as the wrong section had been mentioned in the indictment, the indictment must be quashed. Contrast that case with *Rez v. Tuttle* (2), in which in 1929 a man was charged under s. 21 of the Larceny Act, 1916, with fraudulent conversion in March, 1916. The attention of TALBOT, J. at the trial was called to the fact that s. 21 of the Larceny Act, 1916, was not in force at the time when the conversion was alleged to have taken place, and he allowed an amendment to the indictment by substituting for the section pleaded in the indictment s. 80 of the Larceny Act, 1861, which was in force in March, 1916. The Court of Criminal Appeal upheld the conviction because they held it was within the discretion of the learned judge to allow the amendment, and the defendant was not prejudiced by the mere alteration of the name of the statute. If an indictment mentions the wrong Act and a conviction takes place on that indictment unamended, it is too late to come to the Court of Criminal Appeal and ask them to amend it. The Court of Criminal Appeal must quash the conviction. I do not see any reason why, in the absence of some statutory authority, we should give quarter sessions when they are sitting as a court of appeal larger powers than those which the Court of Criminal Appeal possesses. The reasons given by BYRNE, J., seem to be conclusive of this matter, and I agree the appeal fails.

PARKER, J.: I agree with both judgments delivered, and would only add a word in deference to the argument of counsel for the appellant. His first argument here was that no amendment was necessary as the convictions were good on their face by reason of s. 36 (3) of the Food and Drugs (Milk, Dairies and Artificial Cream) Act, 1950. Section 36 (3) provides:

"Any document referring to any Act or enactment repealed by this Act shall be construed as referring to this Act or the corresponding enactment in this Act."

It seems plain that "any document" in that sub-section must refer to any document existing at the time that that Act was passed, and not a document which has come into existence subsequently. I agree this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Gibson & Weldon*, agents for *Everett & Tomlin*, Pontypool (for the appellant); *T. D. Jones & Co.*, agents for *R. G. Davies*, Abergavenny (for the respondent).

T.R.F.B.

- (1) (1924), 88 J.P. 152.
- (2) (1929), 140 L.T. 701.

KING'S BENCH DIVISION

(LORD GODDARD, C.J., BYRNE AND PARKER, JJ.)

Jan. 24, 1952

BRADSHAW v. DAVEY (VALUATION OFFICER)

Rating—Rateable occupation—Yacht mooring—Chattel and not fixture.

A company, by permission of a harbour board, was allowed to put down moorings in a tidal river, and during the six summer months a director of the company used one of the moorings to moor his yacht. The mooring consisted of two anchors connected by a ground chain to which were attached a riding chain, a buoy rope and a buoy. The anchors were lowered to the river bed by means of the riding chain, but no attempt was made to embed them in the soil. The mooring could be raised to the deck of the yacht without the use of machinery, and was raised and brought to shore each winter and not put down again till the following summer.

Held: that the mooring was to be regarded, not as a fixture, but as a chattel, and, therefore, was not a rateable hereditament.

Cory v. Greenwich (Churchwardens) (1872) (36 J.P. 599) and *dictum* of BLACKBURN, J., in *Holland v. Hodgson* (1872) (L.R. 7 C.P. 335), applied.

CASE STATED by Southampton quarter sessions under the Quarter Sessions Act, 1849, s. 11.

On Jan. 23, 1948, the rating authority for the Fareham Urban District made a proposal for the inclusion in the valuation list of a new hereditament, described as "mooring S.R.H.7 Hamble River", in the sum of £2 gross and £1 rateable value. The ratepayer objected to the proposal, and on Mar. 22, 1948, the Gosport Assessment Committee considered the proposal and the objection and decided to confirm the proposal. The ratepayer appealed to quarter sessions. Under the Local Government Act, 1948, s. 33 (1) (a), and the Local Government Act, 1948 (Appointed Days) Order, 1949 (S.I., 1949, No. 434), made under s. 72 (1) and s. 147 (3) of the Act of 1948, the assessment committee ceased to exist on Feb. 1, 1950. On Apr. 14, 1950, in exercise of the power conferred by reg. 5 of the Rating and Valuation (Transitional) Regulations, 1949 (S.I., 1949, No. 2313), made under s. 71 and s. 72 (2) of the Act of 1948, Southampton Quarter Sessions directed that the functions which would have been exercisable by the assessment committee in relation to this matter, had the committee continued in existence, should be exercised by G. H. Davey, the valuation officer appointed by the Inland Revenue Commissioner for the Gosport Valuation Area, who thereby became the respondent in these proceedings in place of the assessment committee. By consent of the parties and by order of PARKER, J., dated Oct. 2, 1951, a Special Case was stated for the opinion of the High Court.

The ratepayer contended that the mooring was not a rateable hereditament, that there was no rateable occupation by him, and that the mooring should, accordingly, be omitted from the valuation list. The valuation officer contended that the mooring was a rateable hereditament, that the ratepayer was in exclusive beneficial occupation thereof, and that he was correctly rated. The question for the opinion of the court was whether the determination of the assessment committee was correct.

Montagu, K.C., and *W. L. Roots* for the appellant (the ratepayer).

Scott Henderson, K.C., and *Molony* for the respondent (the valuation officer).

LORD GODDARD, C.J.: This is a Special Case stated under the Quarter Sessions Act, 1849, s. 11, the parties having agreed the facts. The question for our decision is whether a mooring for a boat in the river Hamble, which is a great yachting centre, amounts to a hereditament which can be the subject of assessment for rating purposes.

By permission of the Southampton Harbour Board a company was allowed to put down some moorings by their ship repairing yard. One of those moorings is used by the appellant, a director of the company, to moor his five-ton cutter during the summer months. The facts, as set out in the Special Case, are as follows:

"The mooring consists of two Admiralty pattern anchors [i.e., anchors with two flukes], each weighing approximately eighty pounds connected by two lengths $12\frac{1}{2}$ fathoms $\frac{3}{8}$ inch ground chain to the centre of which is attached a riding chain $\frac{5}{16}$ inch in thickness and about eight fathoms in length. A buoy rope and buoy are attached to the chain. A yacht owner must either rent the right to attach to moorings, or, as in the present case, own the necessary cables and weight to provide his own. A mooring as above described is normally laid in the manner of laying two anchors, namely, a laying vessel drops one anchor first, then reverses until she is in a position to lay the second anchor, and then steams half way back to the first anchor, shackles the two anchor cables together and lowers them to the bed of the river by means of the riding chain. No attempt is normally made, and none was made in the case of the particular mooring, to embed or dig the anchors in the soil of the river bed. By the terms of the licence the mooring must be kept secure, which involves the use of anchors and cable of sufficient weight to ensure that the vessel intended to be moored will ride safely and without shifting. This condition of the licence has always been fulfilled. The mooring has been ever since May, 1946, and is primarily used by the five-ton cutter called *Mist*, the property of the appellant. The *Mist* is a cutter rigged sailing vessel some twenty feet in length. She is used for pleasure purposes in and about Southampton Water and is capable of lifting the mooring on deck and has in fact done so. The vessel swings with the tides and never grounds at the mooring. The *Mist* carried ground tackle consisting of one anchor and cable for use when not riding at the mooring. User of the mooring by vessels other than *Mist* is occasional and occurs only by gratuitous permission of the appellant. The mooring is in use almost continuously during the six summer months, but each winter it is raised and brought to shore for inspection and maintenance. By the terms of the licence the mooring must be replaced at the original site and this requirement has been observed."

This court is not considering the question whether the appellant has an easement or merely a licence. Applying the principles laid down by LORD RUSSELL OF KILLOWEN in *Re Southern Rly. Co's. Appeals* (1), I will assume that he has a licence, and, therefore, he is a licensee. No doubt, in view of the *Westminster Corpn.* case (1), some of the cases which have been cited to us today would no longer be decided in the same way, or part of the judgment would be held to be wrong. In my opinion, in view of the authorities, this court cannot hold that this mooring is a rateable hereditament. It is not for me to say what the Court of Appeal can do, but I very much doubt whether any court, except the House of Lords, could hold that it is rateable. There are several cases on this point, culminating in *Cory v. Bristow* (2). First there is *Holland v. Hodgson* (3), which is a decision of the Exchequer Chamber, and, therefore, binding on

(1) 100 J.P. 327, 330; *sub nom. Westminster Corpn. v. Southern Rly. Co.*, [1936] 2 All E.R. 322, 329; [1936] A.C. 511, 529.

(2) (1877), 41 J.P. 709; 2 App. Cas. 262.

(3) (1872), L.R. 7 C.P. 328, 335.

this court. BLACKBURN, J., delivering the judgment of the court, said:

"... an article may be very firmly fixed to the land, and yet the circumstances may be such as to show that it was never intended to be part of the land, and then it does not become part of the land. The anchor of a large ship must be very firmly fixed in the ground in order to bear the strain of the cable, yet no one could suppose that it became part of the land, even though it should chance that the shipowner was also the owner of the fee of the spot where the anchor was dropped. An anchor similarly fixed in the soil for the purpose of bearing the strain of the chain of a suspension bridge would be part of the land. Perhaps the true rule is, that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to show that they were intended to be part of the land, the onus of showing that they were so intended lying on those who assert that they have ceased to be chattels, and, that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land, unless the circumstances are such as to show that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel."

That decision is well known because it is often cited on the question whether certain things are to be regarded as fixtures or not. Applying the test laid down by BLACKBURN, J., I should say that the circumstances here show that the mooring was always intended to be a chattel. It is not one of those heavy moorings which are firmly fixed and would require derricks and elaborate machinery to remove. It can be raised and carried on the deck of a five-ton cutter, and it is taken up every year for the purpose of maintenance and inspection. The fact that it is taken up in the winter months and not put down again until the summer months seems to indicate that it is not a fixture, but is to be regarded as a chattel which does no more than, and is used in the same way as, an anchor which a ship carries, except that it is left in the bed of the river when the ship puts out so that she can fasten to a mooring and slip her mooring instead of having to put down or haul up the anchor every time she comes into or leaves the river.

No doubt, part of the judgment of WILLES, J., in *Cory v. Greenwich (Churchwardens)* (1) would not now be upheld, but the part with which we are concerned here has, I think, been approved by the House of Lords in *Cory v. Bristow* (2). In *Cory v. Greenwich (Churchwardens)* (1) a coal derrick was moored in the Thames

"... by two single-fluked anchors on the side nearest the shore, and by two stones on the channel side, and by two stream-anchors one at the head and the other at the stern. The anchors and stones (which could be hauled on board by the machinery on the derrick) were merely dropped into the river, no force being used for the purpose of fastening them, but only a small quantity of ballast being removed in the bed of the river to enable the stones to lie flat."

It will be observed that the moorings in that case were of an even more weighty kind than the mooring in the case now before us. If they were hauled up, they had to be hauled up by a derrick, which, of course, a five-ton cutter would not carry. Also, a small quantity of ballast was removed from the bed of the river to enable the stones to lie flat. WILLES, J., described the moorings, and said:

(1) (1872), 36 J.P. 599; L.R. 7 C.P. 499.

(2) (1877), 41 J.P. 709; 2 App. Cas. 262.

"The anchors and stones can be hauled on board the derrick by her own machinery, and she may be moved to any other part of the river. All that that statement amounts to is, that the derrick is anchored at the spot where she floats. It is not like an immoveable thing that is susceptible of occupation; the derrick is fastened to things which are accessories to herself, and which are moveable things, whether silted over or not, and which constitute no more an occupation of any portion of the bed of the river than would the anchor of any other vessel."

That case came under review five years later in the House of Lords in *Cory v. Bristow* (1). Referring to the facts of the *Greenwich* case (2), LORD CAIRNS, L.C., said:

"There was a derrick which, as regards that which was above water, appears to have been of the same character as those which I have just mentioned, and it was moored in the river, but it was moored simply in this way . . ."

After describing the mooring in the *Greenwich* case (2), LORD CAIRNS, L.C., said:

"My Lords, under these circumstances, it was held that the moorings were not immoveable from the bed of the river, that they were only, as WILLES, J., expressed it, 'part of the equipment of the vessel itself', and that therefore there were no moorings which could be said to be fixed to the soil of the river and to be occupied as part of the soil by the plaintiffs. That, my Lords, I think, puts aside that authority, and will enable your Lordships, having regard to the facts which are found in the present case, to arrive, as I think you will, without hesitation, at the conclusion that you have here moorings which are clearly fixed into and bedded in the soil of the river Thames, just as much as if piles had been driven ten or twenty feet deep into the soil, and that if you find any person in occupation of those moorings, and that occupation is a beneficial occupation, the person so occupying is occupying hereditaments within the statutes which create chargeability to the assessment to the poor."

LORD HATHERLEY said:

"Then the question arises, are the Messrs. Cory the owners in the sense of being occupiers of land situate within the parish? My Lords, I can have no doubt upon that point when I look at the nature and the character of these mooring chains. They are described in the papers before us, and the case is thereby at once differed from two or three of the cases which have been cited, one being with reference to a floating dock, and another being with reference to an arrangement by which these mooring chains were sunk as they were sunk here, but fixed so far less than here, that they were capable of being moved like other anchors, whereas here they were sunk and fixed, and would have to be hauled up by means of machinery in a derrick. That alters the present case from the case of a floating dock which is, as it were, a vessel floating about upon the water, and which cannot be said to have any immoveability whatever in any given parish, and so can hardly be subject to rates. The circumstance in the other case that the derrick itself, by its own instrumentality, could haul up the stones and mooring chains just as it could any anchor, reduced it again to the case of a ship, of which it could not be predicated that it occupied land situated

(1) (1877), 41 J.P. 709; 2 App. Cas. 262.

(2) (1872), 36 J.P. 599; L.R. 7 C.P. 499.

within a parish. But here we are told by the case itself that the derrick cannot be removed at all except by slipping its chains and cables, because the stones and the rest of the apparatus are so fixed in the bed of the river as to prevent their being hauled up or got up, except by some much more energetic mode of removal."

LORD O'HAGAN's speech was to the same effect, as was LORD BLACKBURN's. LORD BLACKBURN's speech was the more valuable because he was a party to the decision in *Holland's case* (1) and was not a party to the decision in *Cory v. Greenwich (Churchwardens)* (2). I can find no indication in the speeches of any of the noble and learned Lords who decided *Cory v. Bristow* (3) that they differed in any way from the decision to which the Court of Common Pleas had come in *Cory v. Greenwich (Churchwardens)* (2), and, as I read their opinions, I think they thought that the *Greenwich case* (2) was rightly decided. If we held that the mooring in the case now before us was rateable, our decision would be in conflict with *Cory v. Greenwich (Churchwardens)* (2), approved by the House of Lords in *Cory v. Bristow* (3). Therefore, I think we are bound to answer the question submitted to us in this case by saying that the determination of the assessment committee was incorrect and the mooring is not a rateable hereditament. The appellant will have the costs of the case.

BYRNE, J.: I agree.

PARKER, J.: I agree.

Case remitted with opinion of court.

Solicitors: *Layton & Co.* (for the appellant); *Solicitor of Inland Revenue* (for the respondent).

T.R.F.B.

- (1) (1872), L.R. 7 C.P. 328, 335.
 (2) (1872), 36 J.P. 599; L.R. 7 C.P. 499.
 (3) (1877), 41 J.P. 709; 2 App. Cas. 262.

KING'S BENCH DIVISION

(LORD GODDARD, C.J., BYRNE AND PARKER, JJ.)

Jan. 22, 29, 1952

QUALITY DAIRIES (YORK), LTD. v. PEDLEY

Food and Drugs—Milk—Distributor—Failure to ensure cleanliness of vessel—Contract by distributor with wholesale dairymen—Purchase, cleaning and bottling done by wholesale dairymen—Delivery by wholesale dairymen to customer—Liability of distributor—Delegation of duty imposed—Milk and Dairies Regulations, 1949 (S.I., 1949, No. 1588), reg. 26.

By reg. 26 of the Milk and Dairies Regulations, 1949: "Every distributor shall ensure that every vessel (including the lid) used for containing milk shall, immediately before use by him, be in a state of thorough cleanliness."

The appellant company, who carried on business as milk retailers, were "distributors" within the meaning of reg. 26. By a contract between them and Y.P. & Co., wholesale dairymen, Y.P. & Co. agreed to supply, bottle, and deliver milk to certain of the appellants' customers. Under this contract the appellants at no time handled the milk or the bottles into which it was put. Y.P. & Co. delivered a bottle of milk, which was found not to be in a state of thorough cleanliness, to one of the appellants' customers. The appellants were convicted of an offence against reg. 26.

HELD: that the regulation imposed an absolute liability on the distributor to ensure that every vessel used for containing milk should be in a state of thorough cleanliness, and that, therefore, the appellants were liable for the acts of their servants, or agents, or any person to whom they had chosen to delegate their duties, done within the scope of their authority, and so were rightly convicted.

Dictum of ATKIN, J., in *Moussell Bros. v. L. & N.W. Ry. Co.* (1917) (81 J.P. 305), applied.

CASE STATED by the Recorder of York.

At a court of summary jurisdiction at York an information under reg. 26 of the Milk and Dairies Regulations, 1949, was preferred by the respondent, Pedley, deputy town clerk of York, charging the appellant company, Quality Dairies (York), Ltd., for that they, on Sept. 11, 1950, being milk distributors, failed to secure that a vessel used for containing milk, namely, a milk bottle, was, immediately before use by them, in a state of thorough cleanliness, in that there was dirt on the inside of the said vessel. The justices convicted the appellants, who appealed to quarter sessions.

The recorder found that the appellants carried on business as milk retailers in and around the city of York, and were milk distributors within the meaning of the regulation. The appellant had a contract with the York "A" and Tadcaster Hospital Management Committee under which they had undertaken to supply pasteurised milk in bottles to certain hospitals in the area, including a hospital known as The Grange, York. Next door to the appellants a business of wholesale dairymen was carried on by a company referred to as York Producers, Ltd., and the appellants had entered into an oral agreement that for a consideration York Producers, Ltd., would supply, bottle, and deliver all the milk that might be required for delivery to The Grange. York Producers, Ltd., purchased the necessary milk from the Milk Marketing Board, and then cleansed, pasteurised and bottled it on their own premises, using their own bottles, and under a contract with British Road Services, caused the bottles to be delivered to the hospital. From the time when the milk was received from the Milk Marketing Board to the time when it was delivered to the hospital no servant of the appellants in any way touched the milk or the bottles in which it was put. On Sept. 11, 1950, a bottle containing milk was delivered to The Grange pursuant to the contract between the appellants and the hospital management committee and pursuant to the procedure outlined above. That bottle, when delivered, was not in a state of thorough cleanliness in that there was a light fawn coloured marking down the side and inside of the bottle.

It was submitted for the appellants (i) that proof of use of the bottle by them was necessary before the offence charged was made out and that there was no evidence of such use, (ii) that at no time they had any control over the cleansing of the said bottle or the filling of the same with milk and had no opportunity to inspect it before it was finally sealed by York Producers, Ltd., and delivered to the customer. It was submitted for the respondent (i) that the bottle was used by the appellants to fulfil their contract with their customers, (ii) that the appellants, by reason of their contractual relationship with York Producers, Ltd., were in a position to inspect the bottle before delivery, and (iii) that the appellants, as purveyors, were under an absolute duty to ensure that the bottle was thoroughly cleansed. The recorder was of the opinion that the appellants were in such a relationship to York Producers, Ltd., that there was a duty on them to ensure that the bottle was thoroughly cleansed, and, therefore, he affirmed the conviction and the appellants appealed to the Divisional Court.

Hylston-Foster, K.C., and *A. G. Sharp* for the appellant company.

Ahern and *I. Percival* for the respondent.

Cur. adv. vult.

Jan. 29. **PARKER, J.**, read the following judgment of the court. This is an appeal by way of Case Stated from the decision of the recorder for the city of York dismissing an appeal by the appellant company against its conviction by a court of summary jurisdiction of an offence against reg. 26 (1) of the Milk and Dairies Regulations, 1949, made under the Food and Drugs Act, 1938, as amended by the Food and Drugs (Milk and Dairies) Act, 1944, for that it, on Sept. 11, 1950, being a milk distributor, failed to ensure that a vessel used for containing milk, namely, a milk bottle, was, immediately before use by it, in a state of thorough cleanliness, in that there was dirt on the inside of the said vessel.

Regulation 26 (1) provides, so far as is material, as follows:

"Every . . . distributor shall ensure that every vessel (including the lid) used for containing milk shall, immediately before use by him, be in a state of thorough cleanliness . . ."

The facts found by the recorder are, so far as is material, as follows. The appellant company carries on business as milk retailers in and around the city of York, and is a milk distributor within the meaning of reg. 2 (1) of the above-mentioned regulations. The appellant company had a contract with the York "A" and Tadcaster Hospital Management Committee under which it had undertaken to continue to supply pasteurised milk in bottles to certain hospitals in the area, including a hospital known as The Grange, York. Next door to the appellant company a business of wholesale dairymen was carried on by a company referred to as York Producers, Ltd., and the appellant company had arranged that for a consideration York Producers, Ltd. would supply, bottle, and deliver all the milk that might be required for delivery to The Grange. The procedure was that York Producers, Ltd. purchased the necessary milk from the Milk Marketing Board. They then cleansed, pasteurised, and bottled the milk on their own premises, using their own bottles, and under a contract with British Road Services, caused the bottles to be delivered to the hospital. From the time when the milk was received from the Milk Marketing Board to the time it was delivered to the hospital no servant of the appellant company in any way whatsoever touched the milk or the bottles in which it was put. On Sept. 11, 1950, a bottle containing milk was delivered to The Grange pursuant to the contract between the appellant company and the said hospital management committee and pursuant to the procedure outlined above. That bottle, when delivered, was not in a state of thorough cleanliness in that there was a light, fawn coloured marking down the side of and inside the said bottle.

The decision here depends on the true application to the facts of this case of the principle laid down by **ATKIN, J.**, in *Mousell Brothers v. London & North-Western Ry. Co.* (1), where he said:

"I think that the authorities cited by my Lord make it plain that while *prima facie* a principal is not to be made criminally responsible for the acts of his servants, yet the legislature may prohibit an act or enforce a duty in such words as to make the prohibition or the duty absolute; in which case the principal is liable if the act is in fact done by his servants. To ascertain whether a particular Act of Parliament has that effect or not regard must be had to the object of the statute, the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom it would in ordinary circumstances be performed, and the person upon whom the penalty is imposed."

The regulation in question comes within a group of regulations relating to the cleansing and storage of vessels, utensils and appliances used in the preparation and delivery of milk for sale, and made under s. 20 (1) of the Food and Drugs Act, 1938, as amended by the Food and Drugs (Milk and Dairies) Act, 1944, s. 1 (2). These regulations, as it seems to us, were made to ensure, so far as possible, that milk delivered to the consumer should be as clean as possible, and by this particular regulation an obligation is put, *inter alia*, on the distributor to ensure the thorough cleanliness of all vessels used in the preparation of milk for sale, including, of course, the bottles in which the milk is delivered. It seems to us, therefore, that, applying the principle referred to above, the legislation in question has the effect of imposing an absolute duty so that a principal would be liable for the acts of his servant or agent done within his authority. Further, as was pointed out by LORD GODDARD, C.J. ([1946] 1 All E.R. 382), in *Linnett v. Metropolitan Police Comr.* (1), the principle set out in *Moussell's case* (2), as applied in the various decisions thereon, does not depend on the legal relationship existing between master and servant or between principal and agent, but depends on the fact that the person who is responsible in law, as, for example, a licensee under the Licensing Acts, has chosen to delegate his duties, powers, and authority to another. The principle applies, as it seems to us, to a case where, as here, the distributor who is selling milk in bottles sub-contracts the bottling and delivery to another.

It was contended on behalf of the appellant company, both before the recorder and before us, that, though a distributor within the regulation and though selling the milk to the hospital, it was not personally using the bottle in question, and, therefore, cannot be held guilty of an offence against the regulation. This, however, begs the question, since it can be said, and, we think, can properly be said, that the use of the bottle by York Producers, Ltd. was use by the appellant company. It may be that York Producers, Ltd. could also have been prosecuted, or that the appellant company could, when prosecuted, have raised a defence under s. 83 (1) of the Food and Drugs Act, 1938, but we are not called on to decide these questions in the present case. In the premises we think that the appellants were rightly convicted, and that this appeal should be dismissed.

Appeal dismissed.

☞ Solicitors: *Ridsdale & Son*, agents for *Crombie, Wilkinson & Robinson*, York (for the appellants); *Sharpe, Pritchard & Co.*, agents for *T. O. Benfield*, town clerk, York (for the respondent).

T.R.F.B.

(1) 110 J.P. 153, 155; [1946] 1 All E.R. 380, 382; [1946] K.B. 290, 295.

(2) 81 J.P. 305; [1917] 2 K.B. 836, 845.

KING'S BENCH DIVISION

(LORD GODDARD, C.J., BYRNE AND PARKER, JJ.)

Jan. 30, 1952

HARRIS v. HARRIS

Husband and Wife—Maintenance—Discharge of order—"Residence" of wife with husband—Parties living beneath same roof under estranged conditions for more than three months—Subsequent variation of order and remission of arrears obtained by husband—Estoppel—Summary Jurisdiction (Separation and Maintenance) Act, 1925 (15 and 16 Geo. 5, c. 51), s. 1 (4).

In May, 1943, a wife obtained an order for maintenance against her husband. For seven months thereafter, being unable to find other accommodation, by agreement with her husband, she continued to reside with him in a house of which they were joint tenants. She paid half the rent and shared the downstairs rooms, but occupied a separate bedroom. On occasions she did housework for her husband, but did not cook his meals. In 1948 the husband obtained a remission of arrears under the order and an order reducing the amount payable. On a complaint by the wife in 1951 in respect of further arrears,

HELD: (i) that, as the wife had "resided" with the husband for three months after the order had been made in 1943, the order had, by virtue of s. 1 (4) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, on the expiry of that period ceased to have effect for all purposes, and the wife could not recover the arrears claimed.

Evans v. Evans (1946) (112 J.P. 23), applied.

(ii) that the application by the husband in 1948 for a variation of the order and the variation and remission of arrears then granted to him did not act as an estoppel to him from relying on s. 1 (4) of the Act of 1925.

CASE STATED by Wolverhampton justices.

At a court of summary jurisdiction sitting at Wolverhampton on July 19, Aug. 2, and Aug. 16, 1951, a complaint was preferred by the collecting officer of the court on behalf of the appellant wife that the respondent husband had not made weekly payments of £1 15s., which he had been directed to make under a separation order made under s. 5 (a) and (c) of the Summary Jurisdiction (Married Women) Act, 1895, by a court of summary jurisdiction on May 27, 1943, as last varied, on the application of the husband, on Mar. 11, 1948, and that the sum of £20 13s. was in arrear under the order. At the date of the original order and for seven months thereafter the wife lived with the husband in the same house, the tenancy being in their joint names and each paying half the rent. They shared the use of the downstairs rooms, but occupied different bedrooms. On occasion the wife laid the tea and lit a fire and did other housework for the husband, but she did not cook his meals. They normally occupied the same room downstairs when not at work, but in other respects they lived separately. The wife did not leave the house at the time of the original order because she had nowhere else to go and it was mutually agreed between the parties that she should remain for a time to enable her to find other accommodation if she paid half the rent. The wife contended that the husband had approbated the original order by obtaining a varying order and a remission of £42 18s. arrears in 1948 and that he could not now reprobate in regard thereto; that the original order had been superseded by the varying order; that the husband was estopped from showing that the original order was not still in force by his conduct in making the payments under the order and in obtaining a reduction in the payments and a remission of £42 18s. arrears; that the orders, not having been appealed against by the husband, should be enforced; and that the wife had not during the seven months "resided" with the husband within the meaning of the Summary Jurisdiction

(Separation and Maintenance) Act, 1925, s. 1 (4). For the husband it was contended that the wife had resided with him during the seven months within the meaning of s. 1 (4), and, therefore, under that sub-section the original order had ceased to have effect and could not be revived. The justices held that the wife had resided with the husband for a period of more than three months after the making of the original order which, therefore, ceased to have effect under s. 1 (4) of the Act of 1925 and was unenforceable, and they dismissed the wife's application.

R. E. Chapman for the wife.

Syms for the husband.

LORD GODDARD, C.J.: This is a Case stated by justices of the county borough of Wolverhampton before whom the husband was summoned for arrears under a maintenance order. [His LORDSHIP stated the facts and continued:] In the opinion of the justices the conditions under which the parties were living together during the seven months after the original order was made in no way differentiated this case from *Evans v. Evans* (1), which was distinguished in *Thomas v. Thomas* (2) and followed in *Wheatley v. Wheatley* (3). Those cases held, on the construction of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 1 (4), that if a wife, having obtained a maintenance order under the Summary Jurisdiction (Married Women) Act, 1895, did not leave her husband within three months, but continued to reside in the same house, although cohabitation in the full sense of cohabitation between husband and wife was not resumed, the order automatically came to an end.

The Summary Jurisdiction (Separation and Maintenance) Act, 1925, enabled a woman for the first time to take proceedings against her husband while she was still living with him and without having to leave the house, but by s. 1 (4):

"No order made under the [Act of 1895] shall be enforceable and no liability shall accrue under any such order whilst the married woman with respect to whom the order was made resides with her husband, and any such order shall cease to have effect if for a period of three months after it is made the married woman continues to reside with her husband."

Observe the difference between the two parts of the sub-section. It is, apparently, contemplated that a wife who obtains an order might not be able to leave her husband forthwith, but that she must ultimately find some separate accommodation. The Act, therefore, provides that the order is to remain in force if she resides with her husband for less than three months while, for instance, she is looking for accommodation, but she cannot enforce it and obtain maintenance from her husband during that period. If that state of affairs continues for three months the order is to come to an end. As soon as she leaves her husband within the three months she can enforce the order. The words of the sub-section are perfectly clear.

On the question whether the wife continued to reside with her husband, the cases referred to are conclusive and binding on this court. "Residing" by the wife means living in the same house as her husband, and, whether they live on good terms or on bad and whether or not they speak to each other is not material. The courts which decided these cases—this may have some slight bearing on the point of estoppel which has been raised in this case—thought there was an obvious reason for Parliament putting these words into the section. It was never

(1) 112 J.P. 23; [1947] 2 All E.R. 656; [1948] 1 K.B. 175.

(2) 112 J.P. 345; [1948] 2 All E.R. 98; [1948] 2 K.B. 294.

(3) 113 J.P. 459; [1949] 2 All E.R. 428; [1950] 1 K.B. 39.

intended that the wife should get a double benefit by being able to enforce maintenance against her husband and at the same time live in his house, because the sum awarded is supposed to be for her board and lodging and if she is living in her husband's house she may be living rent free, though in the present case there seems to have been some arrangement by which the wife paid 10s. a week towards the rent. It is also undesirable from a public point of view that a wife should be living in the same house as her husband and at the same time insisting on his paying her maintenance under an order of the court. It might easily lead to serious assault and disturbance, or to the wife's being put out of the house summarily. The words "cease to have effect" in the Act of 1925 are different from the words in the Act of 1895, which, by s. 7 were:

"If any married woman upon whose application an order shall have been made under this Act, or the Acts mentioned in the schedule hereto, or either of them, shall voluntarily resume cohabitation with her husband, or shall commit an act of adultery, such order shall upon proof thereof be discharged."

Under the Act of 1895, if cohabitation were resumed, the husband had to apply to the court to get the order discharged. Only then would his liability under the order cease, but under s. 2 (2) of the Act of 1925 the order automatically comes to an end directly cohabitation is resumed, and under s. 1 (4) the order ceases to have effect as soon as the wife has lived in the house with her husband for three months after the making of the order.

The justices have found here that the wife continued to live in the house with her husband, although under the conditions set out in the findings, for a period of seven months. The effect of that would be that their order automatically ceased to have effect at the end of three months. Neither party seemed to know of that provision. Both the husband and the wife went to the court, which made an order in 1948 varying the amount of the original order, but otherwise leaving it in force. We can only look on that order as an order made *per incuriam* and having no effect at all, because everything depends in this case on the original order which had ceased to operate because the wife had remained in the house for three months. We can only construe the words "shall cease to have effect" as meaning that the order becomes void and as though it had never been made. Counsel for the wife has argued that the husband is estopped from raising this point, but he cannot show us any authority for holding that a man is estopped from setting up that an Act of Parliament says that an order is to be of no effect. It is true that in some cases a person is entitled to waive the benefit of some provision in a statute which is inserted entirely for his particular benefit. The maxim is *cuiuslibet licet renuntiare jura pro se introducta*, but we cannot take the view that public interest is altogether to be disregarded for the reasons I have given, which are fully dealt with in the cases referred to, especially *Wheatley v. Wheatley* (1).

For these reasons we are bound to find that the justices had no jurisdiction to make this order because it was a variation of an order which under the section had come to an end. It may be, as I said in *Wheatley v. Wheatley* (1), that, if the attention of the legislature is called to this class of case, they may see fit to make an alteration in the law, because when the Act of 1925 was passed Parliament could not have anticipated the present great housing shortage and the difficulty of getting accommodation, and it is hard that an order should come to an end when the wife may be in a position of extreme difficulty in finding other accommodation. But we cannot alter the construction of statutes

merely because there has been a change in circumstances. That is a matter for Parliament to deal with and not for the courts. The words of the statute here brought the order to an end, and it follows that the justices could not make the order they made and this appeal must be dismissed.

BYRNE, J.: In my opinion, this case is covered by the decision in *Evans v. Evans* (1). The result is that by virtue of s. 1 (4) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, the maintenance order ceased to have effect because the wife resided with her husband for seven months after the making of the order. It follows that the justices were right in holding that arrears under the order were unenforceable. I agree that the appeal should be dismissed.

PARKER, J.: I agree.

Appeal dismissed.

Solicitors: *Wainwright & Co.*, agents for *Kendrick, Williams & Feibusch*, Wolverhampton (for the wife); *Willis & Willis*, agents for *A. C. Skidmore & Co.*, Wolverhampton (for the husband). T.R.F.B.

(1) 112 J.P. 23; [1947] 2 All E.R. 656; [1948] 1 K.B. 175.

KING'S BENCH DIVISION

(LORD GODDARD, C.J., BYRNE AND PARKER, JJ.)

Jan. 31, 1952

REX v. HOLSWORTHY JUSTICES AND ANOTHER. *Ex parte* EDWARDS

Assault—Assault on county court bailiff serving default summons—"Execution under process of court of justice"—Offences against the Person Act, 1861 (24 and 25 Vict., c. 100), s. 46—County Courts Act, 1934 (24 and 25 Geo. 5, c. 53), s. 31.

The applicant, a county court bailiff, preferred an information under s. 42 of the Offences against the Person Act, 1861, against the respondent for an assault alleged to have taken place when the applicant was endeavouring to serve a default summons on the respondent. It was contended on behalf of the respondent at the hearing that, as the alleged assault was one in which a question arose as to an "execution under the process of [a] court of justice", the jurisdiction of the justices was ousted by s. 46 of the Act of 1861 and also that the case was taken out of s. 42 by s. 31 of the County Courts Act, 1934, which prescribes a penalty for assaulting officers of the county court. The justices held that they had no jurisdiction to hear the information.

HELD: that the service of the summons was not an "execution under the process of [a] court of justice" within the meaning of s. 46 of the Act of 1861 and so the jurisdiction of the justices was not ousted by that section, nor was the effect of s. 31 of the Act of 1934, by implication, to take the information out of the scope of s. 42 of the Act of 1861, and, therefore, mandamus must issue directing the justices to hear and determine the information.

Rex v. Briggs (1883) (47 J.P. 615), applied.

Per curiam: Where, on the hearing of an information charging an assault, any question arises as to the title to any lands, tenements, or hereditaments, or any interest therein or accruing therefrom, or as to any bankruptcy or insolvency, or as to any execution under the process of a court, or if, under a charge under the Larceny Act, 1916, a claim of right arises, justices should not dismiss the information, but should take depositions and, if they find that a *prima facie* case is made out, should commit the defendant for trial.

MOTION for order of mandamus.

At a court of summary jurisdiction sitting at Holsworthy, Devon, an information was preferred by the applicant, Leonard Arthur Edwards, a county court

bailiff, under s. 42 of the Offences against the Person Act, 1861, against the respondent, Barker, for an assault alleged to have taken place when the applicant was endeavouring to serve a default summons on the respondent. The respondent contended that the justices had no jurisdiction to hear the information on the ground that it was an assault in which a question arose as to an "execution under the process of [a] court of justice", and that, accordingly, the jurisdiction of the justices was ousted by s. 46 of the Act and proceedings should have been taken under s. 31 of the County Courts Act, 1934. The justices accepted this contention and held that they had no jurisdiction to hear the information. The applicant obtained leave to apply for an order of mandamus directing the justices to hear and determine the information.

R. J. Parker (J. P. Ashworth with him) for the applicant.

Besley for the respondent.

The justices did not appear.

LORD GODDARD, C.J.: We are asked to grant an order of mandamus directing the justices to hear and determine a summons under s. 42 of the Offences against the Person Act, 1861, which relates to the penalties for common assault. The evidence shows that the applicant, a county court bailiff, went to serve a default summons on the respondent, a butcher carrying on business in Holsworthy. The respondent assaulted the applicant when he attempted to serve the summons, and the applicant thereupon laid an information under s. 42 of the Offences against the Person Act, 1861. At the hearing the respondent's advocate took the point that the jurisdiction of the justices to deal with the matter was excluded by s. 46 of the Act of 1861 and also that s. 31 of the County Courts Act, 1934, deals with assaults on bailiffs, and, therefore, impliedly excludes bailiffs from the operation of s. 42.

All these points are untenable. Section 42 deals with an assault, and if an assault has been committed, *prima facie* that section applies. Section 46 provides that the jurisdiction of the justices to hear and determine a charge of assault is ousted in

"... any case of assault or battery in which any question shall arise as to the title to any lands, tenements, or hereditaments, or any interest therein or accruing therefrom, or as to any bankruptcy or insolvency, or any execution under the process of any court of justice."

Serving a summons is not an "execution under the process of any court of justice"; it is simply the commencement of process. The phrase, "execution under process" is perfectly well understood. It means here that where an execution is put in following on a process of the court and some question as to the execution arises the jurisdiction of the justices is ousted. In the present case it is impossible to say that there has either been an execution under a process or that any question arose as to an execution under a process. *Rex v. Briggs* (1) is perfectly clear on the subject, and it also shows that there is nothing in the argument that the existence of the remedy in the County Courts Act, 1934, s. 31, has the effect of taking the case out of s. 42 of the Act of 1861.

I take this opportunity of saying, because there is a certain amount of misapprehension sometimes in courts of summary jurisdiction, that if a claim of right arises, as it may under the Larceny Act, 1916, or if a question arises with regard to the title to any lands, tenements, or hereditaments in an assault case, or a question arises as to any execution under the process of the court, it does not mean that the justices should dismiss the summons because they have

(1) (1883), 47 J.P. 615.

not power to hear and determine it. They must act as if the offence was one only triable on indictment, take the depositions, and commit for trial if they find a prima facie case made out. Even if there was anything in the points submitted to the justices in this case they should not have dismissed the information, but should have sent the case for trial. The order of mandamus must go directing them to hear and determine the case, they having full jurisdiction to do so under s. 42 of the Act of 1861.

BYRNE, J.: I agree.

PARKER, J.: I agree.

Order for mandamus.

Solicitors: *Treasury Solicitor* (for the applicant); *Masons* (for the respondent).

T.R.F.B.

KING'S BENCH DIVISION

(LORD GODDARD, C.J., BYRNE AND PARKER, JJ.)

Jan. 31, 1952

KUSHNER v. LAW SOCIETY

Solicitor—Preparation of instrument for reward—Unqualified person—Estate agent—"Agreement under hand only"—Lease for fourteen years determinable at end of any year—Solicitors Act, 1932 (22 and 23 Geo. 5, c. 37), s. 47 (1), (4) (b)—Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 52 (1), (2) (d), s. 54 (2).

The appellant, an estate agent, was convicted of an offence under s. 47 (1) of the Solicitors Act, 1932, in that, not being a person qualified under the subsection, he had prepared for reward an instrument relating to personal estate. The instrument, which was not under seal, purported to be an agreement for a lease of a flat for fourteen years beginning on Oct. 1, 1948, and contained a provision entitling the tenant to determine the term at the end of any year. The appellant contended that no offence had been committed as the instrument was "an agreement under hand only" within the exclusion from the provisions of s. 47 (1) provided by s. 47 (4) (b) since it was for a term which would not necessarily last for more than three years, and, as such, by s. 52 (2) (d) and s. 54 (2) of the Law of Property Act, 1925, was not required to be under seal.

HELD: that the conviction was right as (i) the instrument in question purported to create a lease for a term exceeding three years notwithstanding the right of the tenant to determine the lease by notice within that period, and, accordingly, under s. 52 (1) of the Act of 1925, was void at law unless under seal; and (ii) an instrument which was not under seal, but was void at law unless under seal, was not "an agreement under hand only" within the meaning of s. 47 (4) of the Act of 1932.

Ex parte Voisey. Re Knight (1882) (21 Ch.D. 442), distinguished.

CASE STATED by County of London Quarter Sessions.

At a court of summary jurisdiction, sitting at Old Street Magistrate's Court, on informations preferred on behalf of the respondent, the Law Society, the appellant, an estate agent, was convicted of offences against the Solicitors Act, 1932, s. 47 (1), in that, not being a barrister or a duly qualified solicitor or other person specified in the subsection, he had, on or about Sept. 27, 1948, prepared instruments relating to personal estate, viz., agreements for the tenancies of two flats. The appellant appealed to quarter sessions, the appeals being heard together on May 16, 1951. The instrument referred to in the first information purported to be an agreement for the lease of a flat for a term of fourteen years.

It was contended for the appellant (a) that the instrument was not an "instrument" within the meaning of s. 47 (1) of the Solicitors Act, 1932, since by s. 47 (4) (b) of the Act the expression "instrument" did not include an agreement under hand only, and the instrument prepared by him was under hand only; (b) assuming that the instrument was a lease and not a tenancy agreement, it was for a term which would not necessarily last for more than three years, in that by cl. (1) (i) thereof the landlords had the right, exercisable in certain circumstances, to determine the term on five months' notice, and, by cl. (3) (d) thereof, the tenant had the right to determine the term at the end of any year, and, therefore, having regard to s. 52 (2) (d) and s. 54 (2) of the Law of Property Act, 1925, the lease was not required to be made by deed. It was contended for the respondent that the instrument was not "an agreement under hand only", within s. 47 (4) (b) of the Act of 1932, and that the case fell within *Harte v. Williams* (1). Quarter sessions held that the instrument was an instrument within the meaning of s. 47 and dismissed the appeals. The appellant appealed to the Divisional Court.

Solley for the appellant.

Cumming-Bruce for the respondent.

LORD GODDARD, C.J.: The appellant was convicted of an offence against the Solicitors Act, 1932, s. 47 (1), which is in much the same terms as s. 44 of the Stamp Act, 1891, and s. 60 of the Finance Act, 1921. Section 47 (1) was designed to prevent the preparation of certain documents by persons who are not legally qualified. Section 47 (1) provides:

"Any person, not being a barrister, or a duly certificated solicitor . . . who, for or in expectation of any fee, gain or reward, either directly or indirectly, draws or prepares any instrument relating to real or personal estate, or any legal proceeding, shall be liable on summary conviction to a fine not exceeding £50."

Section 47 (4), provides:

"For the purposes of this section, the expression 'instrument' does not include . . . (b) an agreement under hand only . . ."

The offence consists, not in procuring the execution of a document, but in drawing or preparing it. Therefore, the offence is complete as soon as the document which is drawn or prepared comes within s. 47. It seems to me that the section must be construed as meaning that, if a person draws or prepares a document which, if it is to be a valid document, must have a seal on it at the time of execution, he commits an offence, and he commits the offence none the less although the document, when executed, does not have a seal on it. Therefore, the question which the court always has to consider in these cases is whether the document which is drawn or prepared is a document which, for the purpose for which it is intended, would require to be a deed or whether it can be equally effective if it is under hand only.

That point does not seem to have emerged very clearly in *Harte v. Williams* (1), especially as *LAWRENCE, J.* (in his dissenting judgment), seems to have thought that, if the document did not have a seal when it was produced, it was an agreement under hand only and an offence had not been committed. The offence, however, lies in preparing the document, and, if it is a document which is void at law unless it is under seal, the fact that a seal is never put on it, in my opinion, makes no difference to the offence. Counsel for the appellant did

(1) [1934] 1 K.B. 201.

not really dispute that proposition, but he contended that the document in question is of a nature which requires only to be under hand and not under seal, as it is merely an agreement and not a deed. Without going too far into the history of the matter, suffice it to say this. The Statute of Frauds, 1677, s. 3, provided, for the first time, that leases, among other things relating to estates in land, must be by deed or note in writing. By s. 1, if an interest in land was created by parol, it would have the force and effect of an interest at will only. By s. 2, leases for a term not exceeding three years were not required to be in writing. By the Law of Property Act, 1925, s. 52:

"(1) All conveyances of land or of any interest therein are void for the purpose of conveying or creating a legal estate unless made by deed. (2) This section does not apply to . . . (d) leases or tenancies or other assurances not required by law to be made in writing."

Therefore, those interests which the Statute of Frauds required to be in writing now have to be made by deed, but those which the Statute of Frauds did not require to be in writing need not be made by deed, and, under s. 54 (2) of the Act of 1925 (which replaces s. 2 of the Statute of Frauds), a lease for a period not exceeding three years can still be by parol.

The question which we have to determine is: Is the document which was prepared by the appellant a lease for a period exceeding three years? The document is in these terms:

"An agreement made this Sept. 27, 1948, between B. Fordyce Ltd. . . . by Sighismond Berger their duly authorised officer empowered to sign tenancy agreements under hand (hereinafter called 'the landlord') of the one part and Eric James Clarke, Esq. . . . (hereinafter called 'the tenant') of the other part whereby the landlord agrees to let and the tenant agrees to take [then the parcels are set out] for the term of fourteen years certain (determinable nevertheless as hereinafter mentioned) to commence from Oct. 1, 1948, yielding and paying therefor (a) the sum of £150 to be paid on or before the execution hereof, (b) the rent of £8 12s. 5d. to be paid in advance on the Monday of each month."

The usual tenant's covenants found in a lease of this description are set out, and then there is this provision, which was to some extent relied on by the appellant:

"In the event of the London Passenger Transport Board from whom the landlords hold the building requiring the building or any part thereof for any purposes connected with its undertaking or any other works connected therewith or with the development or improvement of its property (of which the board is to be the sole judge) and shall give notice to the landlords in that behalf the landlords shall be entitled to give to the tenant notice in writing thereof and of their desire to terminate this agreement and thereupon at the expiration of five calendar months after the service of such notice this agreement and everything herein contained shall cease and be void . . ."

That is a provision for defeasance if the superior landlords exercise rights which they possess. Then there are the landlord's covenants and a proviso:

"If the tenant shall desire to determine the term hereby granted at the end of any year thereof and shall give up to the landlord one month's previous notice in writing of such his desire and shall up to the time of such determination pay the rent and observe and perform the agreements on his part hereinbefore reserved and contained then immediately upon the expiration of

such year as the case may be the present letting and everything herein contained shall cease and be void but without prejudice to the rights and remedies of either party against the other in respect of any antecedent breach or claim of agreement."

Counsel for the appellant contended that, although the term of fourteen years is the term for which the premises are stated to be let, this is not a lease for fourteen years, because the tenant has a right during the tenancy to put an end to the term. Counsel also relied on the provision that the landlord can give notice, but I do not think that that is a strong point. The notice is to be given if the superior landlords require the premises. Every tenant is liable to be disturbed by the act of the superior landlord, if there is one with a title paramount to that of the lessor, but I have never heard it suggested that that causes any uncertainty as to the term which has been granted. *Prima facie*, without considering any authorities, I should have thought it abundantly clear that this document purports to vest a term of fourteen years in the tenant, giving him a right to put an end to that term if he wishes to do so. It is immaterial whether the document is called an agreement or a lease, as it is the effect of the document and not what the parties choose to call it which matters. Counsel for the appellant contends that the tenancy created by the document is to be considered as a yearly tenancy because the tenant may determine the tenancy at the end of any year by giving a month's previous notice. It seems to me that we must apply to this document the same principle which has always been applied to the construction of s. 4 of the Statute of Frauds which provides that contracts not to be performed within a year must be in writing. The principle of law, which is now well established and was re-affirmed by the House of Lords in 1912 in *Hanau v. Ehrlich* (1), is that, if the contract is for an indefinite time but can be determined by either party at reasonable notice within the year, the statute does not apply, but, if the contract is for a definite period extending beyond the year, though it may be concluded by notice within a year, the statute does apply. The agreement now before us purports to create a lease for fourteen years with a provision that it may be determined earlier. Notwithstanding that provision, the lease is for a definite period. As it is not under seal it is invalid in law, but, if it had been under seal, it would confer a title on the tenant to remain in possession of the premises for fourteen years.

The only point that has come up for serious consideration in the present case arises because of dicta in certain text-books in which it is said, on the authority of *Ex p. Voisey. Re Knight* (2), that s. 1 of the Statute of Frauds (which has been replaced by s. 54 (1) of the Law of Property Act, 1925) applies only where the tenancy, if good, must of necessity last for more than three years. The facts in *Ex p. Voisey* (2) were, however, different from those in the case now before us, and I do not think that the decision in that case affects the present matter where the agreement purported to create a definite term exceeding three years. In *Ex p. Voisey* (2) the tenancy which might eventuate was to be a tenancy from month to month. If there is a tenancy from month to month, or from quarter to quarter, or from week to week, or from year to year, it may, of course, go on for an indefinite period. There are many properties in this country which have been held by the same tenants for years on what are generally called "short period" tenancies which can be determined by the landlord giving notice. The act that a tenancy of that kind may go on for a number of years does not make it invalid if it is not by way of deed. I think that is all that *Voisey's case* (2)

(1) [1912] A.C. 39.

(2) (1882), 21 Ch.D. 442.

decides. There is the additional fact, which counsel for the respondent pointed out to us, that the tenancy in that case came into existence only if default was made under a mortgage deed, and, therefore, it was not known when the tenancy would begin.

In my view, the document in the present case was one which, if it had been legally executed, would have vested a term of fourteen years in the tenant notwithstanding the fact that he could terminate the tenancy at an earlier date. The matter, in my opinion, is not affected by the clause whereby the landlord could terminate the tenancy if his superior landlord claimed possession of the whole premises. Accordingly, in my opinion, the document was prepared in breach of the Solicitors Act, 1932, s. 47 (1). Quarter sessions came to a right decision, and this appeal fails.

BYRNE, J.: I agree.

PARKER, J.: I also agree.

Appeal dismissed.

Solicitors: *Bernard Solley & Co.* (for the appellant); *Hempsons* (for the respondent).

T.R.F.B.

PROBATE, DIVORCE AND ADMIRALTY DIVISION

(HAVERS, J.)

Feb. 4, 6, 1952

MASLIN v. MASLIN

Divorce—Condonation—Sexual intercourse—No intention by petitioner to effect reconciliation.

In 1947 the wife deserted the husband, and thereafter, whenever he visited her, she received him with rudeness and abuse and affirmed her refusal to return to him. On Mar. 26, 1951, however, she invited him to visit her and received him cordially. On this and subsequent occasions she asked him to live with her again, but he replied that he needed time to think it over. On Apr. 3, 1951, at the wife's invitation the husband stayed the night with her and "reluctantly gave in" to her and had sexual intercourse. On the following day he told her that he would not agree to live with her again. On the husband's petition for divorce on the ground of desertion,

HELD: the fact that the husband had sexual intercourse with the wife with full knowledge of her offence of desertion constituted condonation of that offence, it being immaterial that the husband did not have the intercourse with the express object of effecting a reconciliation.

UNDEFENDED PETITION by the husband for divorce on the ground of desertion.

During the desertion there had been one act of sexual intercourse between the parties, but it was contended for the husband that this did not amount to condonation since (i) he did not have intercourse with the express object of effecting a reconciliation, and (ii) the intercourse had been induced by a false and fraudulent misrepresentation of fact by the wife.

Victor Russell for the husband.

Cur. adv. vult.

Feb. 6. HAVERS, J.: This was a husband's petition for divorce on the ground of desertion. The suit was undefended, but in the course of the evidence a question arose to which counsel for the husband thought the attention of the

court should be directed. Therefore, I reserved my judgment so that I might analyse the evidence in the light of the authorities.

The parties were married on July 29, 1939, and lived together at various places. The marriage was reasonably happy until the husband was demobilised in December, 1945. Shortly after that date, his wife's attitude changed entirely. She became very quarrelsome and hysterical, and her temper was very bad. She used to throw things at her husband and lock food away from him. In July, 1947, she left him and never returned. I am satisfied that she then deserted her husband and that that desertion continued until an occasion in April, 1951, when he had sexual intercourse with her.

[HIS LORDSHIP said that the husband called to see his wife on a number of occasions, but she was rude and abusive, and when he asked her to return to him she said she would never do so. After the husband had filed his petition, on several occasions the wife asked him to go and see her, and, when he did so, she asked him to stop the night, which he refused to do. On Apr. 3, 1951, however, which was the wife's birthday, at her request he took her out. He saw her home and she asked him to stay the night. He did so. When the parties went to bed the wife started to make love to him and he reluctantly gave in and had connexion with her. He said in evidence that he had not then made up his mind whether he would go back to her.]

HIS LORDSHIP continued: Therefore, it is beyond dispute that on that occasion the husband, who had full knowledge of the matrimonial offence of desertion which his wife had committed, did have sexual intercourse with her. The next morning when they were sitting down to breakfast, the wife said: "I do not need your answer now, I have got it." The husband said he did not see how she had got his answer. Later that day, when he had finished his work, he went to see her again, and he said that, on thinking things over, he did not think that they would be happy together. The wife flew into a temper and said they could both go their own ways and have separate beds. She called him a "dirty rat" and wanted him to stay the night. He refused, and she then cried and became hysterical. He said his wife's crying upset him and he did stay the night. He got into bed with her. She started to make love to him again, but he refused to have anything to do with her. On Apr. 6 he wrote a letter to her saying that he could not agree to live with her again, even if they went their own ways as she had suggested.

It has been laid down in *Henderson v. Henderson & Crellin* (1), that sexual intercourse is a condonation of the wife's adultery unless she induced it by a fraudulent mis-statement of fact. VISCOUNT SIMON, L.C., who delivered the leading opinion, said ([1944] 1 All E.R. 45):

"The essence of the matter is (taking the case where it is the wife who has been guilty of the matrimonial offence) that the husband with knowledge of the wife's offence should forgive her and should confirm his forgiveness by reinstating her as his wife. Whether this further reinstatement goes to the length of connubial intercourse depends on circumstances, for there may be cases where it is enough to say that the wife has been received back into the position of wife in the home, though further intercourse has not taken place. But where it has taken place, this will, subject to one exception, amount to clear proof that the husband has carried his forgiveness into effect. The exception is that, if the intercourse was induced by a fraudulent mis-statement of fact by the wife, that circumstance will prevent the husband's

(1) [1944] 1 All E.R. 44; [1944] A.C. 49.

actions from having the effect of condonation, for example, in *Roberts v. Roberts & Temple* (1), where the husband petitioned for a dissolution of his marriage on the ground of the wife's adultery and it appeared that she had confessed the adultery but had denied, in answer to his question, that she was pregnant in consequence of it, whereupon the husband forgave her and had marital relations with her. It was held by HILL, J., that, since the wife knew she was pregnant and had induced the acts of her husband by false and fraudulent statements, he had not condoned her adultery and was entitled to his decree. I think this decision was right and the view subsequently expressed by McCARDIE, J., in *Cramp v. Cramp & Freeman* (2), should not be understood to cover the exceptional case where the guilty party has made a deliberately false statement and has thereby brought about a situation which would otherwise have been proof of condonation."

Towards the end of his speech where VISCOUNT SIMON, L.C., is dealing with the nature of condonation, he said (*ibid.*, 46):

"Condonation is not a contract at all; it is the overlooking of past wrongs accompanied by action on the part of the aggrieved spouse which shows that they are really forgiven, and the circumstance that the guilty party, before or at the time of condonation, makes promises as to future conduct cannot lead to the consequence that previous offences are no longer condoned, if and when the promises are afterwards repudiated. The result might be different if it could be shown that the husband's forgiveness and taking back of his wife was procured by the wife deliberately misrepresenting her true state of mind, for, as BOWEN, L.J., said in a well-known passage, the state of a person's mind, when it can be definitely ascertained, may be as much a fact as the state of his digestion (*Edgington v. Fitzmaurice* (3), 29 Ch.D. 483)."

Counsel for the husband particularly relied on that passage.

The application of this principle was further considered by the Divisional Court in *Viney v. Viney* (4), where the learned President, dealing with *Henderson v. Henderson & Crellin* (5), said ([1951] 2 All E.R. 208):

"LORD SIMON said . . . there may be a reinstatement without sexual intercourse, but, as against the husband, if there is sexual intercourse and no fraud, that is conclusive of the fact that the husband has confirmed his forgiveness by reinstating his wife as his wife."

I happened to be a member of that court and I expressed complete concurrence in the judgment of LORD MERRIMAN, P., on that issue.

The first point taken by counsel for the husband in the present case was that the husband did not have sexual intercourse with his wife with the express object of trying to effect a reconciliation, and it was contended that that fact distinguished this case from *Henderson v. Henderson & Crellin* (5) and *Viney v. Viney* (4). It seems to me that the intent which the husband has at the time he has sexual intercourse with his wife, he having full knowledge of her matrimonial offence, is completely immaterial. It is the fact that he has sexual intercourse with the wife which, in my view, constitutes condonation, he having full knowledge of her matrimonial offence.

(1) (1917), 117 L.T. 157.

(2) [1920] P. 158.

(3) (1884), 29 Ch.D. 459; *affd.*, C.A., 29 Ch.D. 476.

(4) 115 J.P. 397; [1951] 2 All E.R. 204; [1951] P. 457.

(5) [1944] 1 All E.R. 44; [1944] A.C. 49.

The main contention put forward by counsel for the husband was that, accepting the principle laid down in *Henderson v. Henderson & Crellin* (1), on the facts of this case I ought to hold that the wife had induced the husband to have sexual intercourse with her by a false and fraudulent misrepresentation of fact. I invited counsel to point to any specific representation made by the wife which was false and fraudulent and he was unable to do so, but he contended that, looking at the whole of the statements made by the wife and her conduct prior to the act of sexual intercourse taking place, the wife was representing that she had a genuine desire and intention to live again with her husband as his wife. He contended that that intention was not genuine, that she never had any such intention, and that the only intention she had in her mind was to try to procure some more money from him and possibly also to frustrate the divorce proceedings which he was contemplating. Even assuming that the wife did make such a representation, I am unable to hold that it was false and fraudulent. Counsel relied on the statement which the wife made to the husband the morning after they had slept together: "I do not need your answer now. I have got it". He urged that that showed that the wife's intention was not a genuine intention to live with her husband again as his wife. I find myself unable to accept that as satisfactory evidence of the falseness of the wife's representation. I have to be satisfied not only that the wife made a false and fraudulent statement, but that the husband was thereby induced to have sexual intercourse with his wife. I am quite unable to come to any such conclusion. In my view, the wife was not appealing to the mind of the husband, trying to convince him in that way by means of a representation which was false. Her appeal was to his senses. On the evidence I am unable to find that the husband was induced by any false representation to have sexual intercourse with his wife.

Petition dismissed.

Solicitor: *E. F. Iwi* (for the husband).

G.F.L.B.

(1) [1944] 1 All E.R. 44; [1944] A.C. 49.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., JONES AND PARKER, JJ.)

Feb. 7, 1952

MOWE v. PERRATON

Road Traffic—Taking and driving away vehicle without owner's consent—Servant in charge of master's vehicle—Unauthorised journey outside course of employment—Road Traffic Act, 1930 (20 and 31 Geo. 5, c. 43), s. 28 (1).

The defendant was employed to drive his employers' lorry during the day, and his duty was to drive it to a garage on finishing the day's work. On finishing work on a particular day, without his employers' consent or other lawful authority, he drove the lorry to his house and loaded a radiogram on it with the intention of taking the radiogram to the house of a relative and then driving the lorry to the garage. In the course of his journey he was stopped by police, and he was convicted at a court of summary jurisdiction of taking and driving away a motor vehicle without the consent of the owner or other lawful authority, contrary to s. 28 (1) of the Road Traffic Act, 1930. He appealed to quarter sessions who quashed the conviction.

HELD: that, though the defendant, by driving the vehicle on an unauthorised journey and on a frolic of his own, might have rendered himself liable to a charge of driving an uninsured vehicle, quarter sessions were right in holding that he had not committed an offence under s. 28 (1) inasmuch as he was in lawful possession of the vehicle before he started on the unauthorised journey.

CASE STATED by West Kent Quarter Sessions.

At a court of summary jurisdiction at Bromley an information was preferred by Reginald Perraton, a police officer ("the prosecutor"), charging John Clifford Mowe ("the defendant") with taking and driving away a motor vehicle without the consent of the owner or other lawful authority, contrary to s. 28 (1) of the Road Traffic Act, 1930. The justices convicted the defendant, who appealed to West Kent Quarter Sessions, where the following facts were established.

The defendant was the driver of a lorry which belonged to the Road Haulage Executive and was under hire to the Royal Army Service Corps at Woolwich Arsenal, to whose orders the defendant was subject. The defendant's duty, after he had finished work, was to drive the lorry back to a garage at Woolwich Dock. On Apr. 18, 1951, the defendant, without the consent of his employers or other lawful authority, after leaving Woolwich Arsenal, drove to his own home, where he picked up a radiogram and set out in the lorry with the intention of taking the radiogram to the house of a relative and then driving the lorry to the garage. He was stopped by the police after he had left his house.

For the defendant it was contended that the word "take" was used in s. 28 (1) of the Act of 1930 in its ordinary sense and should not be given the technical meaning of "take" found in the definition in s. 1 of the Larceny Act, 1916, and that he had not taken the lorry within the meaning of s. 28 (1) because he had never relinquished control of it between finishing work and driving it to his house. For the prosecutor it was contended that the word "take" in s. 28 (1) bore the same meaning as in the definition of larceny at common law; that, as a servant, the defendant had custody, and not possession, of the lorry while using it under the orders of the hirers; and that, when driving it to his home instead of to the garage, he took it within the meaning of s. 28 (1). Quarter sessions allowed the appeal and quashed the conviction. The prosecutor appealed to the Divisional Court.

Buzzard for the appellant.

J. H. Gower for the respondent.

LORD GODDARD, C.J.: This is a Case stated by the appeal committee of the West Kent Quarter Sessions, before whom the respondent was charged with an offence against s. 28 (1) of the Road Traffic Act, 1930, in that he

"did take and drive away a motor vehicle . . . without the consent of the owner or other lawful authority."

The respondent was the driver of a lorry which belonged to the Road Haulage Executive and was under hire to the Royal Army Service Corps at Woolwich Arsenal. He had standing instructions that, on finishing work at the arsenal, he should drive the van back to the garage at Woolwich Dock. He did something which, as a servant of his employer, he ought not to have done. Instead of driving to the garage when he had finished work, he drove his van to his house, picked up a radiogram, and set out with the intention of taking it in the van to the house of a relative before driving the van to the garage. His journey was not an authorised journey, and I am far from saying that it is not to be strongly deprecated, because, if an accident had happened, in all probability it would not have been covered by the policy of insurance and he might have committed the offence of driving an uninsured van, but it seems to me wrong to say that what he did was taking and driving away a motor vehicle without the consent of the owner within s. 28 (1) of the Road Traffic Act, 1930. That section is intended to deal with the case of a person who takes a motor car which does not belong to him, drives it away, and then abandons it, because it is difficult to say that he

intended to deprive the owner permanently of the possession, but here the respondent had taken and driven the motor vehicle as part of his work. What he did was unauthorised, but that does not make the taking or the driving away a criminal offence under s. 28 (1). I think it is only necessary to state the facts to show that quarter sessions came to a right decision, and this appeal fails.

JONES, J.: I agree.

PARKER, J.: I agree.

Appeal dismissed.

Solicitors: *Solicitor for the Metropolitan Police* (for the prosecutor); *Francis W. Beech & Taylor, Eltham* (for the defendant).

T R.F.B.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., JONES AND PARKER, JJ.)

Feb. 8, 1952

JONES v. PROTHERO

Road Traffic—Failing to report accident—"Driver"—Engines of vehicle stopped when accident occurred—Road Traffic Act, 1930 (20 and 21 Geo. 5, c. 43), s. 22 (2).

The appellant stopped his motor vehicle on the near-side of a public road, switched off his engine, and remained in the driver's seat for about ten minutes talking to a passenger. He then opened the driver's door on the off-side, and, in so doing, struck a passing cyclist. He failed to report the accident and was charged with an offence against s. 22 (2) of the Road Traffic Act, 1930. It was contended on his behalf that, as he had stopped the engine of the vehicle for a substantial time before the accident, at the time of the accident he was not the "driver" within the meaning of the sub-section. The justices convicted the appellant.

HELD: that for the purposes of the sub-section the "driver" was the person who took the vehicle out on the road and that person remained the driver until he finished his journey, and, therefore, the conviction was right.

CASE STATED by Carmarthenshire justices.

At a court of summary jurisdiction at Llanelly an information was preferred by the respondent, William Prothero, a police officer, charging the appellant, Richard Jones, with being the driver of a motor vehicle and failing to report an accident, contrary to s. 22 (2) of the Road Traffic Act, 1930. The appellant, after driving the vehicle, had stopped on his nearside of the road and switched off his engine and applied his brakes. After talking for about ten minutes to a passenger in the car, he opened the driver's door on the off-side, and, in so doing, struck a pedal cyclist. It was contended on behalf of the appellant that, as he had stopped the engine of the vehicle for a substantial time before the accident occurred, he was not the "driver" within the meaning of the sub-section. The justices convicted the appellant, who appealed to the Divisional Court.

Scott Henderson, Q.C., and Skelhorn for the appellant.

Elsom Rees for the respondent.

LORD GODDARD, C.J.: This is a Case stated by justices for the county of Carmarthen sitting at Llanelly, before whom the appellant was charged

with an offence under s. 22 (2) of the Road Traffic Act, 1930, which provides:

"If in the case of [an accident owing to the presence of a motor vehicle on a road whereby damage or injury is caused] the driver of the motor vehicle for any reason does not give his name and address to any . . . person [having reasonable grounds for requiring them], he shall report the accident at a police station or to a police constable as soon as reasonably practicable, and in any case within twenty-four hours of the occurrence thereof."

The appellant had been driving his motor car along a road when he applied his brakes, stopped on his near-side, switched off his engine, and sat talking business with a passenger in the car for some ten minutes. He then opened the driver's door on the off-side of the car to get out, and, in doing so, he struck a pedal cyclist.

The present case is distinguishable from *Shears v. Matthews* (1), to which we have been referred, because all that was decided in that case was that the respondent had been summoned under the wrong part of s. 78 of the Highway Act, 1835. In the present case it is argued that if a man has stopped for something more than a mere moment the engine of a car which he has been driving he may be in charge of the vehicle, but in law he is not the driver. To give any such narrow meaning as that to the word "driver" would nullify the whole of s. 22. For the purposes of that section the "driver" is the person who takes out the vehicle, and he remains the driver until he finishes his journey. There was ample evidence here on which the justices could find that the appellant was the driver of the car—which, after all, is a question of fact—and this appeal must be dismissed with costs.

JONES, J.: I agree.

PARKER, J.: I agree.

Appeal dismissed.

Solicitors: *A. J. A. Hanhart*, agent for *W. Davies & Jenkins*, Llanelly (for the appellant); *R. I. Lewis & Co.*, agents for *Leslie Williams*, Llanelly (for the respondent).

T.R.F.B.

(1) 113 J.P. 36; [1948] 2 All E.R. 1064.

COURT OF APPEAL

(SOMERVELL AND DENNING, L.JJ., AND ROXBURGH, J.)

Feb. 11, 1952

JEFFERY v. JOHNSON

Bastardy—Evidence—Corroboration—Proof by complainant of handwriting of letter alleged to be written by putative father—Bastardy Laws Amendment Act, 1872 (35 and 36 Vict., c. 65), s. 4.

At the hearing of a summons in bastardy proceedings the complainant, having given evidence that the respondent was the father of the child, sought to rely, as the corroboration of her evidence required by the Bastardy Laws Amendment Act, 1872, s. 4, on a letter which she swore was in the handwriting of the respondent and which, if it had been written by him, constituted an admission by him of his paternity.

Held: the complainant was a competent witness to prove that the letter was in the handwriting of the respondent, and, if her evidence were accepted, the statements contained in it became corroboration in a material particular, within s. 4, of her evidence that the respondent was the father of the child.

Johnson v. Pritchard (1933) (97 J.P. Jo. 754), overruled.

APPEAL of the complainant from an order of the Divisional Court dated Oct. 11, 1951.

Before the justices the complainant, having given evidence alleging that the respondent was the father of her child, sought to rely as corroboration of her evidence, on a letter which she swore was in his handwriting. The justices held that the letter did not constitute corroborative evidence within s. 4 of the Bastardy Laws Amendment Act, 1872. On appeal the Divisional Court upheld their decision, and the complainant appealed to the Court of Appeal.

Hemming for the complainant.

F. L. Clark for the respondent.

SOMERVELL, L.J.: On Aug. 21, 1950, the complainant, Christine Mary Jeffery, gave birth to a child the father of which, she alleged, was the respondent, James Johnson. On Apr. 23, 1951, she took out a summons under the Bastardy Laws Amendment Act, 1872, s. 3 of which provides that the mother of a bastard child may apply to a justice of the peace for a summons to be served on the putative father. Section 4 provides:

"After the birth of such bastard child, on the appearance of the person so summoned, or on proof that the summons was duly served on such person, or left at his last place of abode . . . the justices . . . shall hear the evidence of such woman and such other evidence as she may produce, and shall also hear any evidence tendered by or on behalf of the person alleged to be the father, and if the evidence of the mother be corroborated in some material particular by other evidence to the satisfaction of the said justices, they may adjudge the man to be the putative father of such bastard child . . ."

In the present proceedings the complainant gave evidence that for some six months covering the material dates she and the respondent lived at Bodmin as man and wife, that she became pregnant in December, 1949, that the respondent left her in March, 1950, and went to live at Tenby from where, she said, he sent her various sums of money. She put in, and sought to rely on, a letter which she swore was in his handwriting. She had been asking for money during her pregnancy, and in the letter it was stated:

"By your letter you think I have to send you money. No, I haven't got to yet. This is done just to help you out. As soon as you get the kid you will work and I will send maintenance."

That letter, if it is accepted as coming from the respondent, to my mind, plainly indicates that he was recognising himself as the father of the child. The question is whether the letter can be relied on as corroboration of the complainant's evidence in some material particular. Before the justices the respondent was represented by a solicitor who submitted that he had no case to answer. The justices dismissed the summons, but, at the complainant's request agreed to state a Case.

In **STONE'S JUSTICES' MANUAL**, 65th ed., which was the edition current in 1933, there appeared at p. 409 this note:

"While, as a matter of prudence, it is desirable that the handwriting should be proved by other testimony than that of the woman, we are of opinion that her evidence alone, if credible, is sufficient for the purpose, and that letters, when thus proved may furnish the corroboration required by the statute."

In 1933 *Johnson v. Pritchard* (1) came before the justices and there was an appeal to the Divisional Court. That case was similar to the present in that there was no evidence other than that of the complainant and letters alleged to be written by the respondent, were relied on by her as corroboration. The justices accepted the letters as corroboration, but the Divisional Court held, disapproving of the passage in *STONE'S JUSTICES' MANUAL* which I have read, that a complainant in bastardy proceedings cannot corroborate herself by saying that a letter produced by her was written to her by the alleged father.

In *Moore v. Hewitt* (2) the same point emerged, and LORD GODDARD, C.J., after citing the passage from *STONE'S JUSTICES' MANUAL*, said:

"I hope that *Johnson v. Pritchard* (1) may be considered in a higher court. Sitting in this court, I think I am bound by it, although the court has not got the advantage of any report which shows the reasoning leading to the decision. The difficulty which I feel in accepting the case is that the statute does not require the whole of the complainant's evidence to be corroborated. If the whole of the complainant's evidence had to be corroborated, it would mean that in a great many cases the case could be proved without calling the complainant herself. The complainant's evidence in *Johnson v. Pritchard* (1) seems to have been, first, that the respondent was the father of the child, and, secondly, that two letters which she had received were in the respondent's handwriting. If those letters were admissible on her evidence, the statements in the letters, being written by the respondent himself, were at once evidence against him. While the production of those letters did not corroborate the evidence of the complainant that he wrote them, they corroborated the complainant's evidence that he was the father of the child. That was a material particular, and, therefore, it seems to me that the production of the letters afforded corroboration of the complainant's story in a material particular."

I find the same difficulty about *Johnson v. Pritchard* (1), as was found by LORD GODDARD, C.J. As he says, it is the statements in letters written by the man which are evidence against him and the only question is: Can the mother herself be a competent witness as to his handwriting? I cannot see why she should not be. In the present case it appeared clearly from her primary evidence that she was alleging that the respondent was the father of her child. Then she produces a letter and swears that it is in his handwriting. If that evidence is accepted, the statements in the letter become the material corroboration. In my opinion, I think she should be regarded as a competent witness as to the handwriting and that *Johnson v. Pritchard* (1) was wrongly decided. I would add that I agree with what was suggested in the note in *STONE'S JUSTICES' MANUAL*, 65th ed., that such evidence should be carefully scrutinised. There may be cases where the justices should not be satisfied, in the absence of some independent evidence, or, as is suggested, the calling of the alleged father, who is a compellable witness, but, as a matter of law, it seems to me open to them to accept the mother's identification of the handwriting and there may be many cases where they may be satisfied beyond any reasonable doubt by her evidence. It is a matter which is within their discretion, and they should consider in every case whether it is right to accept the complainant's evidence or whether independent evidence of the handwriting should be required.

Counsel for the respondent raised a subsidiary and different point. He pointed

(1) (1933), 97 J.P. Jo. 754.

(2) 111 J.P. 483; [1947] 2 All E.R. 270; [1947] K.B. 831.

out that the provisions of s. 6 of the Bastardy Act, 1845, which is still operative with regard to appeals to quarter sessions, uses the words

" . . . corroborated in some material particular by other testimony to the satisfaction of the said justices . . . "

He said that "testimony" primarily means oral evidence, and referred us to LUSHINGTON'S LAW OF AFFILIATION AND BASTARDY, 7th ed., p. 97, where the learned editor expresses this view and cites a case in the Privy Council, *Forget v. Baxter* (1), in support. But in that case in which an article of the Civil Code of Quebec was being construed, it is plain that the word "testimony" meant oral testimony. If the word "evidence" had been used in that article it equally plainly would have meant oral evidence. Counsel said that in s. 3 of the Poor Law Amendment Act, 1844, which has now been replaced by s. 4 of the Act of 1872, the word now changed to "evidence" was "testimony". I think the words in their context in those two sections mean the same thing and what, as LORD GODDARD, C.J., said, is plainly evidence, namely, the statements in the letter, once proof of the handwriting had been accepted, would equally be testimony if the matter came on appeal before quarter sessions. For those reasons I think this appeal should be allowed.

DENNING, L.J.: The evidence of the mother can be divided into two parts. First, the part in which she proves orally that the man was the father. Secondly, the part in which she proves the handwriting of the letter. It is the first part, her evidence as to paternity, which needs corroboration. That corroboration is afforded by the contents of the letter. She does not prove the contents of the letter. She only proves the handwriting to be that of the man. Once the handwriting is proved, the contents prove themselves, rather in the nature of evidence like an exhibit which, once it is properly identified, proves itself. Her evidence as to paternity is, therefore, corroborated by other evidence, namely, the contents of the letter. I agree that the appeal should be allowed.

ROXBURGH, J.: I agree for the reasons given by SOMERVELL, L.J.

Appeal allowed.

Solicitors: *G. Howard & Co.*, agents for *V. Meyrick Price*, Tenby (for the complainant); *Rowley, Ashworth & Co.*, agents for *Nash, Howell, Cocks & Clapp*, Plymouth (for the respondent).

G.F.L.B.

PROBATE, DIVORCE AND ADMIRALTY DIVISION

(KARMINSKI, J.)

Jan. 30, 31, 1952

WEBB v. WEBB

Divorce—Custody—“Child the marriage of whose parents is the subject of the proceedings”—Child born during marriage, but not child of husband—Husband registered as father—Matrimonial Causes Act, 1950 (14 Geo. 6, c. 25), s. 26 (1).

Before her marriage the wife conceived a child by a man who was not her husband. She told the husband that she was pregnant, and, when the child was born after the marriage, he registered himself as the father of the child. The wife, having obtained a decree nisi against the husband, applied for an order for the custody of the child.

HELD: on the true construction of s. 26 (1) of the Matrimonial Causes Act, 1950, the child with relation to whose custody the order is made must be a child of the marriage of persons who are in fact the parents of the child; the husband was not the parent of the child; and, therefore, the court had no power to make an order for custody.

APPLICATION by the wife, who had obtained a decree nisi against her husband, for the custody of a child born during the marriage, but whose father was not the husband.

Miss M. Morgan Gibbon for the wife.

J. B. Gardner for the husband.

KARMINSKI, J.: This is an application by the wife, who today obtained a decree of dissolution of her marriage, for the custody of a child born during the marriage.

The parties were married on Nov. 19, 1947. The child was born on Jan. 9, 1948. In the proceedings which were completed today it was made abundantly clear—and, indeed, it was never contested—that the father of this child, who was conceived in or about April, 1947, was a man other than the husband. It is fair to say that the wife told the husband she was pregnant by this man some months before the marriage, that the husband accepted the position and undertook to look after the child as his own, and, indeed, that when the child was born in January, 1948, he registered himself as being the father of the child.

The wife having obtained a decree nisi, I am asked by her counsel to make an order in her favour for custody of that child. I have heard an interesting and ingenious argument, but, in my view, the matter is concluded by the Matrimonial Causes Act, 1950, s. 26 (1) which provides:

“In any proceedings for divorce or nullity of marriage or judicial separation, the court may from time to time, either before or by or after the final decree, make such provision as appears just with respect to the custody, maintenance and education of the children the marriage of whose parents is the subject of the proceedings, or, if it thinks fit, direct proper proceedings to be taken for placing the children under the protection of the court.”

The essence of that sub-section is this. First, there must be a child or children. Then there must be a marriage, but the marriage has to be a marriage of the persons who are in fact and in flesh and blood the parents of the child. Counsel for the wife has argued that because this child was born during the currency of the marriage, therefore, it is *prima facie* not only legitimate, but the child of the parties in this case. I think the proposition so far is unexceptional, but the presumption of legitimacy cannot, in my view, survive clear and cogent

evidence to the contrary. Counsel invited me to divide my mind into two separate compartments—one, to deal with the history and facts of the marriage as they were given in evidence in a heavily contested case, and the other, to regard only the birth of the child and the fact that there was a marriage before that birth.

On an application for custody it would be quite wrong to disregard the important fact that clear and compelling evidence was given in the other part of the suit, which, in my view, completely destroys and rebuts any presumption which may have existed until that evidence was given that the child of the marriage was the child of the husband and wife. In my view, s. 26 (1) means precisely what it says, namely, that the child with relation to whose custody an order is to be made is a child of the marriage of his parents. In this case clearly the husband was not the father of the child, and I hold that I have no jurisdiction to make an order in respect of the custody of the child.

Application dismissed.

Solicitors: *Field, Roscoe & Co.*, agents for *Hallett & Co.*, Ashford, Kent (for the wife); *Foyer, White & Prescott*, agents for *Whitley & Mellor*, Great Malvern, Worcs. (for the husband).

G.F.L.B.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., JONES AND PARKER, JJ.)

Feb. 12, 1952

REG. v. ST. HELENS AND AREA RENT TRIBUNAL: *Ex parte* PICKAVANCE

Rent Control—Furnished house—Application by tenant for reduction of rent—Decision of tribunal—Expiry of three months—Notice to quit served by landlord—Application by tenant for security of tenure—No jurisdiction of tribunal—Certiorari—Furnished Houses (Rent Control) Act, 1946 (9 and 10 Geo. 6, c. 34), s. 5—Landlord and Tenant (Rent Control) Act, 1949 (12, 13 and 14 Geo. 6, c. 40), s. 11 (1).

A tenant of furnished premises applied to a rent tribunal for the reduction of his rent, but the tribunal, on hearing the application, made no change in the rent and no order as to security of tenure. One day after the expiration of three months from the date of the tribunal's decision, the landlord gave the tenant notice to quit. Subsequently, the tenant applied to the tribunal for security of tenure, and the tribunal purporting to act under s. 11 (1) of the Landlord and Tenant (Rent Control) Act, 1949, made an order extending the security.

HELD: reading together s. 5 of the Furnished House (Rent Control) Act, 1946, and s. 11 (1) of the Landlord and Tenant (Rent Control) Act, 1949, only a limited protection was given by those sub-sections to a tenant, designed to prevent retaliation by a landlord in the form of a notice to quit as soon as the tenant had referred the contract to the tenancy; a landlord was within his right in giving notice to quit after the expiration of three months from the date of the decision of the tribunal, the parties being then relegated to their common law rights; and, therefore, the order for extension was made without jurisdiction and certiorari must issue.

MOTION for order of certiorari.

The tenant, William John Leyland, had a weekly furnished tenancy of a house, 51, Rodney Street, St. Helens, Lancashire, of which the applicant, Mrs. Ethel Pickavance, was the landlord, from Aug. 1, 1948, at £1 a week. On Aug.

1, 1950, the tenant applied to the St. Helens and Area Rent Tribunal to reduce the rent, and on Sept. 8, 1950, they gave their decision, making no change in the rent and no order as to security of tenure. On Dec. 9, 1950, one day after the expiration of a period of three months after that decision, the landlord served a notice to quit on the tenant, to take effect on Dec. 18. The tenant then applied to the tribunal for security of tenure, which he was granted. Further extensions were granted at intervals, and with regard to the latest of these the landlord applied for an order of certiorari to quash the decision of the tribunal granting security of tenure, as having been made in excess of jurisdiction.

J. C. D. Harington for the applicant.

J. P. Ashworth for the rent tribunal.

LORD GODDARD, C.J.: Counsel for the applicant moves for an order of certiorari directed to the St. Helens Rent Tribunal to bring up and quash a decision dated Oct. 16, 1951, whereby it directed that a certain notice to quit served by the applicant on her tenant

"shall not take effect until Dec. 11, 1951, being the end of a period not exceeding three months from the date at which the notice to quit would have effect apart from this direction."

This case raises yet another point under the Furnished Houses (Rent Control) Act, 1946, and the Landlord and Tenant (Rent Control) Act, 1949, which, for this purpose, have to be read together. On Aug. 1, 1950, the tenant referred the contract of tenancy, which had lasted a considerable time, to the tribunal. The tribunal made no reduction in rent and gave no direction about security of tenure, and no notice to quit had been served by the landlord on the tenant. The decision of the tribunal was given on Sept. 8, 1950. On Dec. 9, 1950, a notice to quit was served for Dec. 18. The tenant then applied to the tribunal for an extension of security of tenure, and an order was made, which has been followed by a succession of such orders. It is now said, rightly, in the opinion of this court, that the tribunal never had any jurisdiction to grant this extension.

Section 5 of the Furnished Houses (Rent Control) Act, 1946, provides:

"If, after a contract to which this Act applies has been referred to a tribunal by the lessee or by the local authority (either originally or for re-consideration), a notice to quit the premises to which the contract relates is served by the lessor on the lessee at any time before the decision of the tribunal is given or within three months thereafter, the notice shall not take effect before the expiration of the said three months."

So far, especially in the light of the decision in a case to which I shall refer in a few moments, there is not much difficulty. To get this extension of three months the contract must have been referred to the tribunal and a notice to quit must have been given after the reference by the tenant and before the decision of the tribunal or within three months of the decision. If that has been done, the notice will not take effect before the expiration of the said three months, i.e., before the expiration of three months from the decision of the tribunal. Section 11 (1) of the Landlord and Tenant (Rent Control) Act, 1949, provides:

"Where a contract to which the Act of 1946 applies has been referred to a tribunal under that Act, and the reference has not been withdrawn, the lessee may, at any time when a notice to quit has been served and the period at the end of which the notice takes effect (whether by virtue of the contract, of the Act of 1946 or of this section) has not expired, apply to the tribunal for the extension of that period."

In *Rex v. Folkestone and Area Rent Tribunal. Ex p. Sharkey* (1) this court pointed out that the object of that provision was to prevent retaliation by the landlord on his tenant because the tenant had referred the tenancy to a tribunal. We also decided that s. 11 (1) did not give a new power to the tribunal, but only extended the power given by s. 5 of the Act of 1946. Section 5 only applies where a notice to quit has been served after a reference and before a decision or within three months after it. Otherwise it does not give the tenant a right to apply for an extension of the tenancy. Therefore, before s. 11 (1) can take effect exactly, the same circumstances must be shown to exist as are specified in s. 5, because the two sections have to be read together. As pointed out in the course of the argument by PARKER, J., the words were not intended, or, at any rate, are not apt, to give a tenant of a furnished house the protection given by the Rent Restrictions Acts to a tenant of an unfurnished house. They give him only this limited protection in certain circumstances dominated by the fact that they are designed to prevent retaliation by a landlord by serving a notice to quit in consequence of the tenant having referred the matter to the tribunal.

The opening words of s. 11 (1): "Where a contract to which the Act of 1946 applies has been referred to a tribunal . . ." mean where the circumstances have arisen which were contemplated by s. 5. Then,

" . . . the lessee may, at any time when a notice to quit has been served and the period at the end of which the notice takes effect (whether by virtue of the contract, of the Act of 1946 or of this section) has not expired, apply to the tribunal for the extension of that period."

In this case the tribunal not having, on Sept. 8, given any security of tenure, the landlord waited, and, on Dec. 9, the day after the three months had expired, she served a notice to quit. It does not seem to me that that notice to quit is caught by s. 5 of the Act of 1946 on any reading of it, because, although served after a reference to a tribunal, it was not served within three months of the decision of the tribunal. That state of affairs is not dealt with by the Act of 1946, and it seems that s. 11 (1) can have no application either. If s. 5 and s. 11 (1) have to be read together and if the conditions precedent giving the tribunal power do not exist under s. 5, I cannot see where they arise under s. 11 (1). Moreover, if the tenancy had been for a fixed period of, e.g., six months or so many weeks, at the end of which the tenancy was to determine, although during the currency of that agreement the tenant might have gone to the tribunal and asked for a reduction of rent, there would have been no necessity to give a notice to quit by the landlord. The tenancy would have terminated at the end of the fixed period and the tenant could not then have asked for an extension. Parliament has not provided that the tenant can go to a tribunal and ask for an extension of time in every case. We have to decide whether the conditions precedent which are laid down by the combined reading of s. 5 and s. 11 (1) have been fulfilled, and, as they have not been fulfilled, the order was made without jurisdiction and certiorari must go.

JONES, J.: I am of the same opinion.

PARKER, J.: I agree. By s. 5 of the Act of 1946, before security of tenure is granted to a tenant, a notice to quit has to be served after the contract has been referred to the tribunal and either before the decision was given or within three months thereafter. In the present case the reference to the tribunal was on Aug. 1, 1950. Its decision was given on Sept. 8, 1950, and the notice to quit

(1) 116 J.P. 1; [1951] 2 All E.R. 921; [1952] 1 K.B. 54.

was not served until Dec. 9, 1950, i.e., just outside the three months from the time when the tribunal gave its decision. Were it not, therefore, for s. 11 (1) of the Act of 1949 the landlord was perfectly within her rights in giving a notice to quit after the expiry of that three months when the parties were relegated to their ordinary common law rights.

It is said, however, that by reason of s. 11 (1) of the Act of 1949 the tribunal has jurisdiction to grant an extension of security of tenure whenever a notice to quit has been served, provided only that it has been served after the contract has been referred to the tribunal. The words in s. 11 (1) cited in support of this contention are as follows:

"Where a contract to which the Act of 1946 applies has been referred to a tribunal under that Act, and the reference has not been withdrawn, the lessee may, at any time when a notice to quit has been served and the period at the end of which the notice takes effect (whether by virtue of the contract, of the Act of 1946 or of this section) has not expired, apply to the tribunal for the extension of that period."

It is urged before us on behalf of the tribunal that the notice to quit there referred to, provided it has been served after the contract has been referred to the tribunal, may afford jurisdiction, and reliance is placed on the words "at any time when a notice to quit has been served". I do not feel that one can get very much help from the words "at any time". The section does not provide, "when at any time a notice is served and application has been made". The words "at any time" refer only to the period during which the application can be made, viz., the period between the service of a notice and its expiry. Therefore, the question comes to a very short point—whether the words "when a notice to quit has been served" are perfectly general, referring to any point of time in the future, or whether they refer to a notice to quit served within the limits of time specified in s. 5 of the Act of 1946. In deciding which is the true construction of those words it is relevant to bear in mind s. 11 (5), which provides that s. 11 is to be construed as one with the Act of 1946. As was said by this court in *Rex v. Folkestone and Area Rent Tribunal. Ex p. Sharkey* (1), the object of s. 5 of the Act of 1946 was to prevent retaliation by the landlord, and the power in s. 11 (1) is a power to extend security of tenure, i.e., as I read it, to extend the security of tenure afforded by s. 5 of the Act of 1946. If, therefore, in the circumstances of a case, the Act of 1946 provides no security of tenure, there is nothing for s. 11 (1) to operate on and to extend. It seems to me that within its context, bearing those considerations in mind, the words "when a notice to quit has been served" in s. 11 (1) must mean when a notice to quit has been served within the three months of time specified by s. 5 of the Act of 1946. For these reasons I agree with the judgment my Lord has delivered.

Order of certiorari.

Solicitors: *Neve, Beck & Co.*, agents for *Joseph Davies & Son*, St. Helens (for the landlord); *Solicitor, Ministry of Health* (for the rent tribunal).

T.R.F.B.

(1) 116 J.P. 1; [1951] 2 All E.R. 921; [1952] 1 K.B. 54.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., JONES, BYRNE, PARKER AND MCNAIR, JJ.)

Feb. 1, 12, 1952

SIMPSON v. PEAT

Road Traffic—Careless driving—Error of judgment—Road Traffic Act, 1930 (20 and 21 Geo. 5, c. 43), s. 12 (1).

A driver of a motor vehicle who fails to exercise that degree of care and attention which a reasonably prudent driver would have exercised in the circumstances is guilty of the offence of driving without due care and attention, contrary to s. 12 (1) of the Road Traffic Act, 1930, irrespective of whether or not his failure might be said to be the result of an error of judgment.

Rex v. Howell (1938) (103 J.P. 9), explained.

CASE STATED by Essex justices.

At a court of summary jurisdiction at Stansted an information was preferred by the appellant, Arthur William Simpson, a police officer, charging the respondent, Roderick Mackay Peat, that he, on July 9, 1951, at Stansted drove a motor car on a road without due care and attention, contrary to s. 12 (1) of the Road Traffic Act, 1930.

It was proved or admitted that at 6.15 p.m. on July 9, 1951, the respondent drove a motor car at a reasonable speed in Cambridge Road, Stansted (which was a main road) in the direction of Cambridge and was approaching Chapel Hill, a minor road leading off to his right. A motor cyclist was driving in the opposite direction at a reasonable speed, approaching Chapel Hill on his left. As the two vehicles approached the respondent drove his car to the right, intending to turn into Chapel Hill, and so came into the path of the motor cyclist and a collision occurred.

The justices found that the respondent had committed an error of judgment in thinking that he had left room for the motor bicycle to get through, and, in view of the statement in *STONE'S JUSTICES' MANUAL*, 83rd edn., p. 2160, note (1), citing *Rex v. Howell* (1938) (103 J.P. 9), they held that he could not in law be guilty of the offence charged. Accordingly, they dismissed the information and the appellant appealed.

Milton for the appellant.

Southall for the respondent.

Cur. adv. vult.

Feb. 12. LORD GODDARD, C.J., read the following judgment of the court. This is a Special Case stated by justices of the county of Essex before whom the respondent was charged with having driven a motor car on a road without due care and attention, contrary to s. 12 (1) of the Road Traffic Act, 1930. The facts found by the magistrates show that the respondent was driving at a reasonable speed on the Cambridge Road at Stansted in the direction of Cambridge and was approaching a side turning to his right called Chapel Hill. At the same time a motor cyclist was driving in the opposite direction, also at a reasonable speed, and was approaching Chapel Hill, which was, of course, on his near side. The justices then find that, as the two vehicles approached, the respondent drove his vehicle to the right with the intention of entering Chapel Hill, thus crossing the path of the oncoming motor cyclist with the result that a collision took place. Having heard the evidence and arguments, the justices were of opinion that the respondent should be convicted, which can only mean that they were then satisfied that he was driving without due care and attention. In announcing their decision and in the course of passing sentence the chairman

expressed the opinion of the bench that the respondent had committed an error of judgment in thinking that he had left room for the motor bicycle to get through when, in fact, he had not done so. Thereupon it was contended on behalf of the respondent that, as the bench found he had committed an error of judgment, he could not in law be guilty of the offence charged, and there was cited in support of this contention a passage in *STONE'S JUSTICES' MANUAL*, 83rd ed., p. 2062, which refers to *Rex v. Howell* (1). The magistrates further considered the case and state their final decision in these words:

"(i) That the respondent had committed an error of judgment in driving in the manner set out in para. 4c of this Case; (ii) and that, as what the respondent had done was to commit an error of judgment, he could not in law be guilty of the offence of driving a motor car without due care and attention, and we accordingly held that the respondent was not guilty of the offence charged in the information and we dismissed the same."

If the true effect of *Howell's* case (1) is what the justices thought it was, and it is only fair to them to say that they did not see the full report, it is obvious that this case raises a question of great importance and would be cited constantly when charges of this nature were preferred. Accordingly, it was thought right, when it first came to be heard, to have it re-argued before a full court of five judges. *Howell's* case (1) is twice referred to in *STONE'S JUSTICES' MANUAL*, 83rd ed., vol. 2, each time in relation to the offence of dangerous driving, contrary to s. 11 (1) of the Act. At p. 2062, note (i), it is stated as authority for the proposition that:

"If the driving, although dangerous in its consequences, was due to a 'mere' error of judgment, the defendant is entitled to be acquitted."

At p. 2160, note (k), the quotation is:

"He is entitled to be acquitted if the dangerous driving was a 'mere' error of judgment."

The former is, perhaps, the more accurate citation of the two, but when the case is properly understood it will be seen that it laid down no principle of law, but turned entirely on what the Court of Criminal Appeal thought a jury had meant to find by their verdict. It was a case where manslaughter was charged, and, as is well known, on such a charge a jury can convict also of the offence of dangerous driving created by s. 11 (1). The jury acquitted of manslaughter and from the discussion that then took place between the foreman and the learned judge the Court of Criminal Appeal thought that what the jury meant by using the expression "mere error of judgment" was that, though a dangerous situation had, in fact, arisen, they were not prepared to hold that this was due to dangerous driving by the defendant, and, accordingly, they quashed the conviction. It is by no means impossible, and, indeed, it must on occasions happen, that a situation of danger arises in which a motorist is involved, but it cannot be said that he caused it by driving dangerously. That is what the court thought the jury meant. They were certainly not laying down that an error of judgment could not amount to carelessness.

The expression "error of judgment" is not a term of art. It is, in fact, one of the vaguest possible description. It can, colloquially, be used to describe either a negligent act or one which, though mistaken, is not negligent. When one is considering s. 12, the marginal note of which is "careless driving", it is, in our opinion, clear that a driver may not be using due care and attention

although his lack of care may be due to something which could be described as an error of judgment. If he is driving without due care and attention it is immaterial what caused him to do so. The question for the justices is: Was the defendant exercising that degree of care and attention that a reasonable and prudent driver would exercise in the circumstances? If he was not, they should convict. If, on the other hand, the circumstances show that his conduct was not inconsistent with that of a reasonably prudent driver, the case has not been proved. The justices here thought that *Howell's* case (1) obliged them as a matter of law to dismiss the summons, but the question whether a man is driving carelessly, to use a compendious expression, raises only a question of fact.

It has often been pointed out that it is unfortunate that questions which are questions of fact alone should be confused by importing into them as principles of law a course of reasoning which has, no doubt, properly been applied in deciding other cases on other sets of facts: see, for instance, *Tidy v. Battman* (2), and for this purpose there can be no distinction between civil and criminal matters. We think it would be better if reference to *Howell's* case (1) were omitted from the books, not because we dissent from the decision, but because the case laid down no principle of law and should not be regarded as doing so. It is, in our opinion, undesirable to complicate these cases, which raise only simple questions of fact, by such loose and vague expressions as "error of judgment". Whether the charge is under s. 11 (1) or s. 12 (1), the offence can be committed although no accident takes place. Equally, because an accident does occur it does not follow that a particular person has driven either dangerously or without due care and attention. But if he has, it matters not why he did so. Suppose a driver is confronted with a sudden emergency through no fault of his own. In an endeavour to avert a collision he swerves to his right—it is shown that had he swerved to the left the accident would not have happened. That is being wise after the event, and, if the driver was, in fact, exercising the degree of care and attention which a reasonably prudent driver would exercise, he ought not to be convicted, even though another, and, perhaps, more highly skilled, driver would have acted differently.

Here, on the facts stated, the court is of opinion that the magistrates' first decision was clearly right. The defendant was turning to his off side in a main road cutting across the line of traffic coming from the opposite direction. It was not found that the motor cyclist was driving too fast or that the respondent was confronted with a sudden emergency. It is not even found that he gave a signal, but in any case it was for him to take care that he could execute the manoeuvre in safety. To use the words of the justices in their finding, he thought he had left room for traffic coming in the opposite direction to get through when in fact he had not done so. In those circumstances there was no reason in law why he should not have been convicted and the case must go back to the justices with a direction to convict.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Arthur Morgan*, Chelmsford (for the appellant); *Gedge, Fiske & Co.*, agents for *A. E. Floyd & Co.*, Great Dunmow, Essex (for the respondent).

T.R.F.B.

(1) (1938), 103 J.P. 9.

(2) [1934] 1 K.B. 319.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., JONES AND PARKER, JJ.)

Feb. 13, 1952

SIDNEY TRADING CO., LTD. v. FINSBURY CORPORATION

Rent Restriction—Premium—Rent exceeding two-thirds of rateable value—Agreement by tenant to pay general rates—Subsequent agreement by landlords with rating authority to pay rates themselves—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 and 11 Geo. 5, c. 17), s. 12 (7)—Landlord and Tenant (Rent Control) Act, 1949 (12 and 13 Geo. 6, c. 40), s. 2 (1).

On Dec. 22, 1950, by a written agreement, the appellants, the landlords, let a furnished flat to a tenant for one year at a rent of £5 4s. for that period, and as a condition of the grant of the tenancy required a premium of £41. By the same agreement the tenant agreed to pay to the appellants for transmission to the appropriate authorities all existing or future general and water rates. On Jan. 18, 1951, the appellants entered into an agreement with the rating authority whereby they agreed themselves to pay to the rating authority the general rates assessed on the flat as from Oct. 7, 1950. At all material times the rateable value of the flat was £8. On a charge of having required an illegal premium as a condition of the grant of a tenancy to which the Rent Restriction Acts applied, contrary to s. 2 (1) of the Landlord and Tenant (Rent Control) Act, 1949, the appellants contended that, as the rent was less than two-thirds of the rateable value, by virtue of s. 12 (7) of the Increase of Rent, etc., Act, 1920, the Rent Restriction Acts did not apply to the letting, and that, accordingly, the premium was not illegal. The magistrate convicted the appellants.

HELD: that, for the purposes of the Rent Restriction Acts, the court, in deciding what was "rent," must look at the total monetary payments made by the tenant to the landlord; the monetary payment in the present case was £5 4s. together with a sum for rates, which brought the amount that the appellants were receiving to more than two-thirds of the rateable value of the flat; the agreement between the appellants and the rating authority being retrospective, the court could not have regard to the fact that it was made after the tenancy, and it did not have the effect that the landlords received the rates from the tenant merely for transmission to the appropriate authority. Therefore, the flat came within the Rent Acts and the decision of the magistrate was right.

Property Holding Co., Ltd. v. Clark, [1948] 1 All E.R. 165; [1948] 1 K.B. 630 and *Alliance Property Co. v. Shaffer*, [1949] 1 All E.R. 312; [1949] 1 K.B. 367, applied.

CASE STATED by a Metropolitan magistrate.

At Old Street magistrate's court an information was preferred by Finsbury Corporation charging the appellants, Sidney Trading Co., Ltd., "for that they on Dec. 2, 1950 . . . did require a premium on the grant of a tenancy of the flat No. 112, Bartholomew Buildings, Seward Street . . . Finsbury . . . for the term of one year . . . which . . . premises are subject to control under and by virtue of the Rent and Mortgage Interest Restrictions Acts, 1920-1939, contrary to s. 2 (1) of the Landlord and Tenant (Rent Control) Act, 1949."

On Dec. 22, 1950, the appellants entered into a written agreement with a tenant whereby, in consideration of the sum of £41 paid by the tenant, the appellants let the flat for the term of one year from Dec. 22, 1950, to the tenant at a rent of £5 4s. a year. The tenant by the same agreement agreed to pay to the appellants for transmission to the appropriate authorities all existing or future general and water rates. On Jan. 18, 1951, the appellants entered into an agreement with the rating authority whereby they agreed to pay to the rating authority the general rates assessed upon the flat as from Oct. 7, 1950. The general rate in the borough of Finsbury was 19s. 6d. or £1 in the £1 at the relevant times. At all material times the rateable value of the flat was £8.

* It was contended for the appellants that the rent of £5 4s. a year was less

than two-thirds of the rateable value of the flat, and, therefore, by s. 12 (7) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, the Rent Acts did not apply to the premises and the sum of £41 was not an illegal premium within s. 2 (1) of the Act of 1949. It was contended for the corporation that the rates payable by the tenant to the respondents must be included in the "rent", and that, therefore, it exceeded two-thirds of the rateable value. The magistrate, being of opinion that the contention for the respondents was correct, convicted the appellants who appealed to the Divisional Court.

Heathcote-Williams, Q.C., and *B. Finlay* for the landlords.
Widgery for the council.

LORD GODDARD, C.J.: This is a Case stated by the learned metropolitan magistrate sitting at Old Street, before whom the landlords, Sidney Trading Co., Ltd., were summoned for a breach of the Landlord and Tenant (Rent Control) Act, 1949, s. 2 (1), in that they required the payment of a premium as a condition of the grant of a tenancy of a flat which was alleged to be subject to the Rent Restrictions Acts. The learned magistrate held that the offence had been committed and the question for determination is whether the flat was within the Rent Acts.

Section 12 (7) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, provides:

"Where the rent payable in respect of any tenancy of any dwelling-house is less than two-thirds of the rateable value thereof, this Act shall not apply to that rent or tenancy . . ."

That provision was, no doubt, meant to deal with the case where a person let a house at a purely nominal rent. In the present case, on Dec. 22, 1950, an agreement was entered into by which the flat was let for a year at a rent of £5 4s., payment being required of a premium of £41. If there had been nothing more than that, it may be that the flat would have been outside the Rent Acts, because the rateable value was £8 and £5 4s. is less than two-thirds of £8. Clause 3 of the agreement, however, contained the following provision:

"The tenant agrees to pay to the landlord for transmission to the appropriate authorities all existing or future general and water rates."

The question is whether or not the money that has to be paid to the landlords for rates is part of the "rent" for the purposes of s. 12 (7). On Jan. 18, 1951, the landlords entered into an agreement with the local authority, under the Poor Rate Assessment and Collection Act, 1869, s. 3, whereby they made themselves liable to the authority for the rates in respect of the flat and were to be allowed a commission of ten per cent. for doing so. That agreement was retrospective in the sense that they agreed to pay the rates from Oct. 1, 1950. After that agreement was entered into any money paid by the tenant to the landlords which represented rates would be paid by the landlords to the local authority, not as agents for the tenant, but on their own behalf under the agreement.

Property Holding Co., Ltd. v. Clark (1), and *Alliance Property Co., Ltd. v. Shaffer* (2), seem to me to lay down clearly that the test for deciding what is "rent" for the purpose of the Rent Restrictions Acts, is to ask: What is the total monetary payment to be made by the tenant to the landlord? One has not to regard the rent from the common law point of view of something issuing

(1) [1948] 1 All E.R. 165; [1948] 1 K.B. 630.

(2) [1949] 1 All E.R. 312; [1949] 1 K.B. 367.

out of the land for which a distress could issue. To quote from the words of EVERSHED, L.J., in *Property Holding Co., Ltd. v. Clark* (1):

"... the question in each case is to determine what in substance is the subject-matter of the tenancy granted to the tenant by the contract. Prima facie the rent is the monetary compensation payable by the tenant in consideration for the grant, however it be described or allocated."

If a flat is let at a rent of, say, £100 a year inclusive of rates, that £100 is "rent" although some part of it represents what the landlord has to pay to the local authority for rates. So, here, in substance the monetary consideration which the tenant agreed to pay for this tenancy—leaving the premium out of the question—is the £5 4s. plus a certain sum for rates. It seems to me on the authority of the two cases which I have mentioned that it matters not whether the payment is for rates, for service, or for the use of furniture. If there is a sum of money which the tenant agrees to pay as a consideration for the tenancy, it is for this purpose a rent. Therefore, in my opinion, the landlords are receiving here a rent of more than two-thirds of the rateable value.

It has been strongly urged that, as the agreement between the landlords and the local authority was made after the date of the agreement with the tenant, the court should ignore the former agreement and only have regard to cl. 3 of the tenant's agreement. Whatever weight might have attached to that argument if the agreement had not been made retrospective, I do not stop to consider, because any sums of money which the landlords received from the tenant after they had made this retrospective agreement could not be transmitted to the local authority. The tenant was not the rated person. His obligation to pay rates could only have arisen if the landlords had failed to pay, when he could have been made to pay under s. 12 of the Poor Rate Assessment and Collection Act, 1869, and then would have had a right to recover the amount of the rates from his landlords. The position the landlords created by their own action was that, as from Oct. 1, they were paying the rates as principals and not as agents for their tenant, and they could not be heard to say that they were in any way receiving the money from the tenant for transmission to the local authority. They were receiving a sum of money which the tenant had agreed to pay them. What they did with that money thereafter was a matter for themselves. They were not to transmit any sum of money the tenant paid them for rates, because they had to pay the rates themselves out of their own pocket.

For these reasons I think that the reasoning in *Property Holding Co., Ltd. v. Clark* (1) and *Alliance Property Co., Ltd. v. Shaffer* (2) applies. Consequently, this was a rent-controlled flat, an offence was committed in taking a premium, and the decision of the learned magistrate was right.

JONES, J.: I agree.

PARKER, J.: I agree.

Appeal dismissed.

Solicitors: *M. & H. Shanson* (for the landlords); *John E. Fishwick*, town clerk (for the council).

T.R.F.B.

(1) [1948] 1 All E.R. 165; [1948] 1 K.B. 630.

(2) [1949] 1 All E.R. 312; [1949] 1 K.B. 367.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., JONES AND PARKER, JJ.)

Feb. 14, 1952

REG. v. DURHAM QUARTER SESSIONS. *Ex parte* VIRGO

Quarter Sessions—Power to remit case to justices—Plea of Guilty—Statement by defendant inconsistent with plea—Summary Jurisdiction Act, 1879 (42 and 43 Vict., c. 69), s. 31 (1) (vii), (as substituted by the Summary Jurisdiction (Appeals) Act, 1933 (23 and 24 Geo. 5, c. 38), s. 1).

Where, on an appeal to quarter sessions against a conviction by a court of summary jurisdiction, the question arises whether the plea put in by the defendant at the court of summary jurisdiction amounted to a plea of Guilty or Not Guilty, quarter sessions are entitled to examine the matter and pay regard to anything said by the defendant before the court of summary jurisdiction which was inconsistent with a plea of Guilty, and, if they come to the conclusion that a plea of Guilty was wrongly entered, they have power, under s. 31 (1) (vii) of the Summary Jurisdiction Act, 1879 (as substituted by s. 1 of the Summary Jurisdiction (Appeals) Act, 1933), to remit the matter to the court of summary jurisdiction with an expression of opinion that a plea of Not Guilty should have been entered.

Dictum of LORD GODDARD, C.J., in Rex v. West Kent Quarter Sessions. Ex parte Files (115 J.P. 525), explained.

Rex v. Ingleson ([1915] 1 K.B. 512), applied.

MOTION for orders of certiorari and prohibition.

At a court of summary jurisdiction at South Shields, one Bruce ("the defendant") was charged with stealing a motor bicycle. He elected to be dealt with summarily, and pleaded Guilty. The solicitor appearing for the prosecution made a statement of the facts to the court, none of which was disputed by the defendant, who was not represented. The defendant was then asked whether he had anything to say, and he said: "It was a mistake. I thought it was my mate's cycle. My mate said: 'Take it home.' My mate's bike is identical." The defendant did not ask the justices to alter the plea and it was not altered. The defendant was sentenced to six months' imprisonment, and appealed against his conviction to Durham Quarter Sessions. The objection was taken on behalf of the prosecutor, Virgo, that, as the defendant had pleaded Guilty before the justices, he had no right of appeal against conviction. Quarter sessions, being of opinion that the statement made by the defendant to the justices should have been interpreted and accepted as a plea of Not Guilty, remitted the case to the justices under s. 31 (1) (vii) of the Summary Jurisdiction Act, 1879, as substituted by s. 1 of the Summary Jurisdiction (Appeals) Act, 1933, with an expression of opinion that a plea of Not Guilty should have been entered. The prosecutor obtained leave to apply for an order of certiorari to quash the order of quarter sessions as having been made in excess of jurisdiction and an order of prohibition to prohibit quarter sessions from entertaining an appeal against the conviction.

Michael Hughes for the applicant (the prosecutor).

Vernon Gattie for quarter sessions.

J. R. Johnson for the defendant.

LORD GODDARD, C.J.: Counsel for the applicant has moved for an order of certiorari to bring up and quash an order made by the appeal committee of Durham Quarter Sessions whereby, on an appeal by a man named Bruce against a conviction before a court of summary jurisdiction, the committee directed that

"the matter of the said conviction be and is hereby remitted to a court

of summary jurisdiction acting for the said county borough of South Shields, this court being of opinion that the statement made by [Bruce] to the said court of summary jurisdiction on July 30, 1951, should have been interpreted and accepted as a plea of 'Not Guilty'."

What happened was this. Bruce was charged with having stolen a motor bicycle. Before the court of summary jurisdiction he elected to be dealt with summarily, and, on being asked, he pleaded Guilty. No evidence was called, but a solicitor who appeared for the prosecution made a statement of the facts to the bench, none of which was disputed by the defendant, who was not represented. At the end of that statement, when asked whether he had anything to say, the defendant said:

"It was a mistake, I thought it was my mate's cycle. My mate said, 'Take it home'. My mate's bike is identical."

That was really a plea of Not Guilty, because, if his mate had asked him to take his bicycle home and he had taken the other bicycle by mistake, he was not guilty of larceny. However, he did not ask the justices to alter the plea and they did not do so. After hearing the defendant's somewhat unfortunate record, they sentenced him to six months' imprisonment. Bruce then asked if he could see a solicitor, and he was granted legal aid. Afterwards he was granted bail and appealed to quarter sessions. At quarter sessions the prosecution took the objection that, as he had pleaded Guilty, he had no right of appeal. It was said on the authority of *Rex v. West Kent Quarter Sessions. Ex p. Files* (1) that quarter sessions could not entertain the appeal. Having, however, heard what the defendant said before the justices before he was sentenced, quarter sessions decided that the justices ought to have entered a plea of Not Guilty, and, accordingly, they sent the case back to the justices under the powers which they have under the Summary Jurisdiction Act, 1879, s. 31 (1) (vii), as substituted by the Summary Jurisdiction (Appeals) Act, 1933, s. 1.

The case depends on whether *Rex v. West Kent Quarter Sessions. Ex p. Files* (1) applies or can be distinguished. Many cases have come before the court on the question whether or not a plea of Guilty has properly been entered. In *Rex v. Campbell. Ex p. Moussa* (2) a man was charged with a breach of the Aliens Order, 1920, because he had not registered as an alien. He was an Egyptian, and when he was brought before the magistrate on the charge of having failed to register, he was not asked whether he pleaded Guilty or Not Guilty in the ordinary way, according to the practice which at that time obtained in the metropolitan police courts. Instead the clerk said to him: "Are you an Egyptian?", and he answered: "Yes, I am". That was construed as an admission that he was an alien. He was then asked whether he had failed to notify the registration officer of a change of address and he said he had, and thereupon he was convicted. He desired to appeal to quarter sessions and it was objected that, as he had pleaded Guilty, he had no right of appeal, but this court decided that he had not pleaded Guilty and granted mandamus to the London Sessions to hear the appeal.

That case is not quite *in pari materia* with the present matter because there the defendant had never been directly asked the question: "Are you guilty or not guilty". He had been asked whether he was an Egyptian, and he said that he was. The view of AVORY, J., who dissented, was that that was an admission that he was an alien, and that, having admitted that he had not notified the change of address, he had then admitted the truth of the information. The other two

(1) 115 J.P. 522; [1951] 2 All E.R. 728.

(2) 85 J.P. 189; [1921] 2 K.B. 473.

judges, however, thought he had not made that admission because, although he said he was an Egyptian, he might have contended that, nevertheless, he was a British subject. They held that that did not amount to a plea of Guilty, and ordered quarter sessions to hear the case.

Rez v. Ingleson (1), which came before the Court of Criminal Appeal, is singularly like this case. The appellant was charged with receiving and without any doubt at his trial he pleaded Guilty. At the same time he handed up a statement to the learned recorder which, if believed, as LORD COLERIDGE, J., said, giving the judgment of the court, was a complete exculpation, concluding, as it did, with the words: "I am guilty of taking the horses not knowing them to be stolen". The court held that that amounted to a plea of Not Guilty, because the appellant said he did not know the horses were stolen, and ordered that a plea of Not Guilty be entered and that the case go back for re-hearing. That is exactly what quarter sessions did in this case. They treated the proceedings before the justices as a nullity because the trial had proceeded on the footing that Bruce had pleaded Guilty when quarter sessions thought that the plea ought to have been Not Guilty. Therefore, they said that the proceedings consequent on the plea were bad, a plea of Not Guilty must be entered, and the case must go back for re-hearing.

In *Rez v. West Kent Quarter Sessions. Ex p. Files* (2) the facts were altogether different. A man of considerable education was charged with dangerous driving. He had been served with the summons, and I said, in giving judgment:

"Unless the applicant is blind, cannot read, or is mentally defective—none of which is suggested—there can be no doubt whatsoever that he must have understood that with which he was being charged. That goes to merits, perhaps, and not to jurisdiction. The evidence shows that the clerk of the court read out verbatim the full particulars of the charge as shown in the information."

The charge was:

"Driving a motor vehicle on a road at a speed which was dangerous to the public, contrary to s. 11 (1) of the Road Traffic Act, 1930"

and the particulars were,

"... on Feb. 3, 1951, at the parish of Northfleet . . . unlawfully did drive a motor vehicle, to wit, a motor car, on a road there called Watling Street, at a speed which was dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road, and the amount of traffic which was actually at the time, or which might reasonably have been expected to be, on the road."

The clerk read the summons to him verbatim, asked him if he was legally represented, and, when he said he was not, said that it was a serious charge. As I said in my judgment:

"He then informed the applicant in formal language of his right to be tried by a jury at quarter sessions. Before he took his reply, he explained to him in simple language exactly what that meant, and the applicant answered: 'I want to be dealt with this morning'. 'I then said', says the clerk in his affidavit, 'In that case do you plead Guilty or Not Guilty?'. Neill replied: 'Guilty'. I spoke again to Neill in these terms: 'You are quite certain about that? You admit the offence, do you?', and Neill replied: 'Yes'."

(1) [1915] 1 K.B. 512.

(2) 115 J.P. 522; [1951] 2 All E.R. 728.

In those circumstances there was no question that the defendant not only pleaded Guilty, but also intended to plead Guilty. He persuaded quarter sessions, however, to hold an inquiry whether he had pleaded Guilty under a mistake. Quarter sessions, for reasons which, no doubt, appeared good to them, but which this court entirely failed to understand, said they had come to the conclusion that the man had made a mistake, and entertained an appeal. We said: "You cannot do a thing like that. Here is a man who in court deliberately and intentionally, after being warned, pleads Guilty. If everybody who pleads Guilty and finds that the sentence is one he does not like can appeal to quarter sessions, there will be no end to the proceedings". The present case, however, is, I think, distinguishable. It is true that in the *West Kent* case (1) I concluded my judgment by saying:

"It is not the case of a court inquiring into matters to find out whether they had jurisdiction or not. On the face of the proceedings before the court was a statement by the appellant that he pleaded Guilty. In those circumstances, quarter sessions had no right to hear the appeal, and they must be prohibited from entertaining it."

I think the concluding words of my judgment go too far. Where the question in the case is whether or not the plea which was put in by the prisoner at the hearing before the justices amounted to a plea of Guilty or Not Guilty, that it a matter which the court can entertain. It would be putting it too high against an unrepresented prisoner who, when first charged, had said that he pleaded Guilty, but, before being sentenced, had made to the court a statement which showed that he meant to deny that he had acted feloniously or criminally, to say: "You said you were Guilty, and, therefore, there is an end of it". It must not be taken that the concluding words of my judgment in the *West Kent* case (1) preclude courts of quarter sessions from considering whether the plea which was made before the court of summary jurisdiction, taking all that the prisoner said together, was a plea of Guilty or Not Guilty.

This is not a case of a defendant who unequivocally pleaded Guilty and then said: "I made a mistake". It is a case in which at the trial the defendant said: "Guilty, but . . ." and added a statement which showed that he was really pleading Not Guilty. Every judge and most magistrates know that it is quite a common thing for a prisoner arraigned at assizes or quarter sessions, when the charge is put to him, to say he is Guilty, but so-and-so and so-and-so, and the clerk of assize always says: "That is a plea of Not Guilty. Enter a plea of Not Guilty".

The court of summary jurisdiction in this case ought to have entered a plea of Not Guilty, and then the case could have been tried. If convicted, the defendant would have had a right to appeal to quarter sessions. He appealed to quarter sessions against his conviction and his ground of appeal really amounted to this: "I did not plead Guilty. I pleaded Not Guilty and the plea of Guilty is wrongly recorded". Quarter sessions came to the conclusion that the plea of Guilty was wrongly recorded, not because the defendant did not understand or did not intend to plead otherwise than he did, but because, taking the whole of his plea together, they were satisfied that in law it amounted to a plea of Not Guilty. I think they were right in entertaining the appeal to that extent, and that, as the defendant had never been tried on a plea of Not Guilty, they were entitled to treat the conviction as a nullity, as the court did in *Rex v. Ingleston* (2). Therefore, they were right to exercise the powers which they had

(1) 115 J.P. 522; [1951] 2 All E.R. 728.

(2) [1915] 1 K.B. 512.

under s. 31 (1) (vii) of the Act of 1879 (as substituted by the Summary Jurisdiction (Appeals) Act, 1933), of sending back the case to petty sessions with an expression of their opinion. This application for certiorari must, therefore, be refused.

JONES, J.: I agree.

PARKER, J.: I agree.

Orders of certiorari and prohibition refused.

Solicitors: *Speechly, Mumford & Craig*, agents for *Harold Ayrey*, town clerk, South Shields (for the applicant); *Sharpe, Pritchard & Co.*, agents for *J. K. Hope*, clerk of the peace, county of Durham (for quarter sessions); *H. Pollard*, South Shields (for the defendant).

T.R.F.B.

COURT OF APPEAL

(SOMERVELL AND DENNING, L.JJ., AND ROXBURGH, J.)

Feb. 11, 19, 1952

BURGESS v. JARVIS AND OTHERS

Town and Country Planning—Enforcement notice—Need to specify both date on which notice takes effect and period within which restoration must be carried out—Town and Country Planning Act, 1947 (10 and 11 Geo. 6, c. 51), s. 23 (2) (3).

In 1936 the first defendant built a block of sixteen houses in contravention of existing planning control and let one of them to the plaintiff. In 1951 the planning authority served on the first defendant, on the plaintiff, and on the other occupiers of the houses, an enforcement notice which was purported to be given under s. 23 (1) of the Town and Country Planning Act, 1947, as applied by s. 75 (1) of that Act, requiring the demolition of the houses and restoration of the land to its original condition "within five years after the date of the service of this notice." On a claim by the plaintiff against the first defendant and the local authority for a declaration that the enforcement notice was invalid and an injunction,

HELD: on the true construction of s. 23 (2) and (3), the enforcement notice should specify both the period (not less than twenty-eight days) at the expiration of which the notice took effect, and the period within which the particular steps for restoring the land had to be taken, and, as the latter period only had been specified, the notice was invalid.

APPEAL by the first defendant from an order of PARKER, J., in chambers, made on Oct. 12, 1951, whereby he granted an injunction restraining the first defendant from demolishing a house, of which he was owner and the plaintiff was tenant, until an order under s. 289 of the Public Health Act, 1936, as applied to an enforcement notice under s. 23 (1) of the Town and Country Planning Act, 1947, had been made.

In 1951 the local planning authority served on the first defendant an enforcement notice requiring him to demolish the house, which, with fifteen other houses, had been built in 1936 by the first defendant in contravention of planning control, and to restore the land to its former condition within five years of the service of the notice. On receipt of the notice the first defendant gave the plaintiff notice to quit, stating that he intended to demolish the house.

The Court of Appeal allowed the plaintiff to join the local authority as a defendant and to amend his writ so as to claim against both defendants that the enforcement notice was invalid on the ground that it did not specify any period at the expiration of which it should take effect as required by s. 23 (3) of the Town and Country Planning Act, 1947, and, alternatively, that the notice specified only one period as that at the expiration of which the notice should take effect and within which the notice should be complied with, which was contrary to the requirements of s. 23 (2) and (3) of that Act.

P. M. O'Connor for the first defendant.

MacKenna, Q.C., and *King Anningson* for the plaintiff.

Theisger, Q.C., and *H. J. Baxter* for the local authority.

SOMERVELL, L.J.: This appeal raises an important point, but, as I have come to a clear conclusion on it, no useful purpose will be served by not giving judgment now.

The plaintiff was the tenant and the first defendant was the landlord of one of a block of sixteen houses built by the first defendant in 1936. Those houses were erected in contravention of an interim development scheme. We are not concerned with the precise state of the law before the Town and Country Planning Act, 1947, on the construction of which Act this appeal depends and which, by s. 75 (1), gave power to issue enforcement notices in respect of development before the Act in contravention of previous planning control provided that they were served within three years of the appointed day (July 1, 1948). Therefore, if, as is argued, the enforcement notices issued in this case were bad, it may be that that matter cannot now be put right.

On May 19, 1951, the Sevenoaks Rural District Council, who have been joined as defendants, served an enforcement notice under s. 23 (1) of the Act of 1947 on the first defendant and on the occupiers of these houses. The first defendant did not challenge that notice, nor did he exercise the right, though a limited right, of appeal which exists under the Act of 1947. Instead he served notices to terminate the tenancies, and notified all the tenants that he intended to demolish the houses at the end of July, 1951. The plaintiff then issued the writ in these proceedings claiming an injunction against the first defendant to restrain him from demolishing the house which the plaintiff was occupying under a weekly tenancy protected by the Rent Acts. The matter came before *PARKER, J.*, in chambers who granted an injunction to restrain the first defendant from demolishing the house unless and until an order was made pursuant to s. 289 of the Public Health Act, 1936, as applied by regulations made under s. 24 (5) of the Act of 1947. When the case came on before us it was intimated on behalf of both the first defendant and the plaintiff that it was desired by the plaintiff to take a new point which had not been argued before the judge, and which, if successful, would decide the issue. That was that the enforcement notice served on the first defendant was invalid in that it did not contain the provisions and terms required by the Act of 1947. We were told that everyone desired the court to decide the point. This court does not, generally speaking, encourage points being taken here which have not been taken below, in particular when they involve the adding of a new party, in this case the Sevenoaks Rural District Council. We came to the conclusion, however, that, as this raised an important point on the construction of a statute and it was obviously of interest to everyone that a decision should be obtained on it so far as this case and other cases are concerned, we should adopt the procedure which we were asked to adopt.

By s. 75 (1) of the Act of 1947 the provisions of the Act with respect to

enforcement notices are made applicable, subject to the limitation period to which I have referred, to breaches of planning legislation committed before the Act. Section 23 provides:

"(1) If it appears to the local planning authority that any development of land has been carried out after the appointed day without the grant of permission required in that behalf under this Part of this Act, or that any conditions subject to which such permission was granted in respect of any development have not been complied with, then, subject to any directions given by the Minister, the local planning authority may within four years of such development being carried out, if they consider it expedient so to do having regard to the provisions of the development plan and to any other material considerations, serve on the owner and occupier of the land a notice under this section. (2) Any notice served under this section (hereinafter called an 'enforcement notice') shall specify the development which is alleged to have been carried out without the grant of such permission as aforesaid or, as the case may be, the matters in respect of which it is alleged that any such conditions as aforesaid have not been complied with, and may require such steps as may be specified in the notice to be taken within such period as may be so specified for restoring the land to its condition before the development took place, or for securing compliance with the conditions, as the case may be; and in particular any such notice may, for the purpose aforesaid, require the demolition or alteration of any buildings or works, the discontinuance of any use of land, or the carrying out on land of any building or other operations. (3) Subject to the provisions of the next following sub-section, an enforcement notice shall take effect at the expiration of such period (not being less than twenty-eight days after the service thereof) as may be specified therein: Provided that—(a) if within the period aforesaid [the period to be specified under sub-s. (3)] an application is made to the local planning authority under this Part of this Act for permission for the retention on the land of any buildings or works, or for the continuance of any use of the land, to which the enforcement notice relates, the notice shall be of no effect pending the final determination of that application, and if such permission as aforesaid is granted on that application, the notice shall not take effect; (b) if within the period aforesaid an appeal is made to the court under the following provisions of this section by a person on whom the enforcement notice was served, the notice shall be of no effect pending the final determination or withdrawal of the appeal. (4) If any person on whom an enforcement notice is served under this section is aggrieved by the notice, he may, at any time within the period mentioned in the last foregoing sub-section, appeal against the notice to a court of summary jurisdiction for the petty sessional division or place within which the land to which the notice relates is situated; and on any such appeal the court (a) if satisfied [on certain matters] . . . shall quash the notice to which the appeal relates; (b) if not so satisfied, but satisfied that the requirements of the notice exceed what is necessary for restoring land to its condition before the development took place, or for securing compliance with the conditions, as the case may be, shall vary the notice accordingly; (c) in any other case shall dismiss the appeal: Provided that where the enforcement notice is varied or the appeal is dismissed, then, without prejudice to the provisions of para. (a) of the proviso to sub-s. (3) of this section, the court may, if they think fit, direct that the enforcement notice shall not come into force until such date (not being later than

twenty-eight days from the determination of the appeal) as the court think fit."

Sub-section (5) provides for an appeal to quarter sessions. Section 24, which deals with sanctions, provides by sub-s. (1):

"If within the period specified in an enforcement notice, or within such extended period as the local planning authority may allow, any steps required by the notice to be taken (other than the discontinuance of any use of land) have not been taken, the local planning authority may enter on the land and take those steps and may recover . . . any expenses reasonably incurred by them on that behalf . . ."

Section 24 (3) provides that where, by virtue of an enforcement notice, any use of land is required to be discontinued, any person who without permission uses the land or permits the land to be used in contravention of the notice is guilty of an offence.

In my opinion, the effect of s. 23 is that there are two periods, each of which has to be specified in the notice. The first in point of time, though it comes later in the section, is the period under s. 23 (3), that is, the period at the expiration of which the enforcement notice takes effect. The second, which arises under s. 23 (2), is the period, also to be specified, within which the specified steps for restoring the land, and so on, have to be taken. It is plain that the second of those periods does not start until the first has expired and the notice has taken effect. That seems to me the plain meaning of the words, and, if one considers them in their context, the reason for the first period is obvious. The first period is that during which the notice can be challenged, permission can be asked for, and any person aggrieved can appeal. The owner or occupier or both may want to appeal, and one, therefore, would expect a period for appeal during which the notice is ineffective. That period must be not less than twenty-eight days. It may be prolonged if there is an appeal under the provisions which I have read, and the date of taking effect is suspended. If the appeal is dismissed, the notice takes effect subject to a power in the proviso to s. 23 (4) enabling the court to say that it shall not come into force until a further date, not being later than twenty-eight days. It is unnecessary to consider for what precise purpose that proviso was inserted, because it does not, to my mind, affect the general construction.

That being, as I think, the general effect of these provisions, I turn to the notice. After recitals which are not disputed we come to the point on which the argument arises:

"Now therefore the rural district council of Sevenoaks do hereby give you notice in pursuance of their powers as local planning authority under s. 23, s. 24 and s. 75 of the Town and Country Planning Act, 1947, to:—Demolish the aforementioned sixteen houses and restore the land to its condition before the aforementioned operations took place within five years after the date of the service of this notice."

It will be seen that only one period is specified. Counsel for the local authority submits that the Act does not require two periods to be mentioned; that the words "take effect" in s. 23 (3), when the section is looked at as a whole and read in conjunction with s. 24, mean the moment of time after which sanctions can be taken. He said that in the case of the present notice no offence is committed by anyone until after the expiration of five years, which, therefore, is the date when the notice takes effect, and that it is wrong to treat the taking effect as on the expiration of a preliminary period for the purpose of appeal.

On that view it follows that, as he submits, an appeal could be brought, or permission sought, under sub-s. (3) at any time up to the end of the five years.

Having given what I think is the natural meaning of these words, I will give other reasons why I find it impossible to accept that argument. One reason why the period within s. 23 (2) is different from the period within s. 23 (3) is that the period in sub-s. (3) is qualified by the words "not being less than twenty-eight days". If there was only one period one would expect that qualification to appear in the earlier sub-section. If the period intended to be specified under sub-s. (3) was the same as the period to be specified under sub-s. (2), under ordinary drafting principles it would be referred to in sub-s. (3) by reference so as to make it clear that there was only one period to be specified. For another reason one would need very strong words to produce the result to which the argument of counsel for the local authority leads. It is obvious that the period of five years is the period within which the demolition is to take place. I agree there is no sanction unless there has been a failure to do it within that period. In a case where both an owner and an occupier are involved, one gets a most anomalous state of affairs if the right of appeal (say) by the occupier remains available right up to the end of the period within which the landlord is called on to demolish, because, on this construction, when the house was half demolished there would still be notionally a right of appeal.

For these reasons, in addition to what, after all, is the guide in these matters, namely, the meaning of the words in their ordinary significance, I think the submission of counsel for the local authority fails. The section requires two periods, and, in particular, it requires the period to be specified at the expiration of which the notice is to take effect. It is at the end of that period, which is an uncertain date because of the possibility of an appeal, that the period, conveniently referred to as the "period for compliance", should begin. As the notice given in the present case did not comply with the provisions of s. 23, as construed, I think it is invalid and inoperative.

For these reasons I think the order made by the learned judge must be varied, and the appeal allowed in the respect which I have indicated.

DENNING, L.J.: I agree. In my opinion, s. 23 (3) of the Act of 1947 clearly imports that an enforcement notice must allow at least twenty-eight days after service before it takes effect. It must not be so framed as to take effect at once. The reason is so that the owner or occupier may be given time to apply to the planning authority for permission to retain the house or to appeal to the justices. If he makes his application or appeals within twenty-eight days, the notice does not take effect until the matter is determined. The question is whether the present notice satisfies the requirements of the Act. Counsel for the local authority argued that this notice only takes effect at the end of five years after service, viz., on May 19, 1956. I cannot take that view. The notice requires the owner to demolish sixteen houses "within five years after the date of service of this notice." A similar notice was served on each of the occupiers of the houses. Looking at the wording of the notice, it is clear that it took effect at some time before the expiration of five years, because the owner was required to act within that time. If the notice takes effect before the end of five years, when does it take effect? The only possible date is the date on which it is served, because, unless it took effect then, the owner would not have the benefit of the full five years allowed to him to do the work. The result is, therefore, that this notice took effect at once. It did not allow the occupier the minimum of twenty-eight days before it took effect. It ought to have specified from which

date it took effect, and that period should be a minimum of twenty-eight days after service of the notice. It did not specify any period. It was, therefore, invalid.

ROXBURGH, J.: I agree that this enforcement notice is invalid, because it does not specify the date on which it is to take effect. Counsel for the local authority submitted that, if the notice specified a period within which the work required was to be done, then no further date need be specified, because the notice took effect at the moment of the expiry of the period within which the work was to be done. Such a conclusion seems to me impossible if the work required to be done is other than a metaphysical operation, with which this Act is not concerned.

Order varied.

Solicitors: *Light & Fulton*, agents for *W. H. House & Son*, Sevenoaks (for the first defendant); *Hewitt, Woollacott & Chown* (for the plaintiff); *Knocker & Foskett*, Sevenoaks (for the local authority).

G.F.L.B.

PROBATE, DIVORCE AND ADMIRALTY DIVISION

(LORD MERRIMAN, P., AND KARMINSKI, J.)

Feb. 20, 1952

CHORLTON v. CHORLTON

Justices—Husband and wife—Maintenance—Discharge of order—Adultery—Sexual intercourse by former wife after dissolution of marriage—No evidence that alleged intercourse occurred with married man—Summary Jurisdiction (Married Women) Act, 1895 (58 and 59 Vict., c. 39), s. 7.

On Mar. 28, 1947, the wife was granted by justices a maintenance order against her then husband. On Jan. 9, 1950, the marriage was dissolved, but the maintenance order was allowed to stand. On Dec. 7, 1951, the husband applied to the justices to discharge the order on the ground of his former wife's adultery with a named man, but he adduced no evidence that this man was married at the time of the alleged adultery.

HELD: unless it were proved that the man with whom the former wife was alleged to have committed adultery was married at the material time, any sexual intercourse which might have occurred between them could not constitute an act of adultery, and, therefore, the maintenance order would continue in the former wife's favour.

Abson v. Abson (ante, p. 92), applied.

APPEAL by the husband against the dismissal on Dec. 7, 1951, by the Stoke-on-Trent justices of his application to discharge an order for maintenance made in favour of his wife on Mar. 28, 1947.

M. E. Holdsworth for the husband.

Fife for the wife.

LORD MERRIMAN, P.: This is a husband's appeal from the dismissal by the justices for Stoke-on-Trent on Dec. 7, 1951, of his application to discharge a maintenance order in favour of the wife made on Mar. 28, 1947, on the ground of his desertion. The marriage between the spouses was dissolved by decree absolute on Jan. 9, 1950, on the ground of the husband's adultery, there being

no prayer for the exercise of the discretion on the part of the wife. Notwithstanding the decree absolute, the maintenance order has been allowed to stand by virtue of the decision in *Bragg v. Bragg* (1), which settled that the mere fact that a marriage has been dissolved does not automatically discharge a subsisting order.

The present application was based on an allegation that the wife had committed adultery with a named man. The justices ruled, in effect, that, though there had been opportunity, there was no evidence of guilty affection, and they dismissed the application. It now appears, however, that there was a more fundamental reason for the dismissal of the application, namely, that there was no evidence that at the material time the man in question was married. In other words, the case was put on the ground that because the wife had been a wife, because a wife can commit adultery, and because an order in favour of a former wife can be kept alive under the authority of *Bragg v. Bragg* (1), it follows as a matter of law that a former wife, as if she were a wife, can commit adultery even with a single man. In the recent case of *Abson v. Abson* (2) it was proved that the paramour was a married man and it was sought to argue that because a wife had been divorced she could not commit adultery, even if she was having sexual relations with a married man. We took the view that, whether or not that argument was acceded to, the wife should be left to whatever rights she had in the Divorce Court.

I am not prepared to accede to the view that a husband can establish adultery against his former wife by proof that she has had sexual intercourse with a man without proving that that man was married at the material time. For that reason we have not thought it necessary to consider the weight of the evidence which was adduced to show that sexual intercourse took place between these persons. This appeal, therefore, fails and must be dismissed.

KARMINSKI, J.: I agree.

Appeal dismissed.

Solicitors: *Kenneth Brown, Baker, Baker*, agents for *G. H. Morgan & Sons*, Shrewsbury (for the husband); *Doyle, Devonshire & Co.*, agents for *Moxons*, Hanley, Stoke-on-Trent (for the wife).

G.F.L.B.

(1) [1925] P. 20.

(2) *Ante* p. 92; [1952] 1 All E.R. 370.

COURT OF APPEAL

(SIR RAYMOND EVERSHED, M.R., JENKINS AND HODSON, L.JJ.)

Jan. 17, 18, Feb. 22, 1952

BURNELL v. DOWNHAM MARKET URBAN DISTRICT COUNCIL

Rates—Rateable occupation—Playing field—Acquisition by local authority by deed—Trust for perpetual use by public under Open Spaces Act, 1906—Restriction on user by public.

A playing field was purchased and equipped out of moneys obtained by public subscription and a grant from the Ministry of Education. It was conveyed to the local council by deed upon trust "for the perpetual use thereof by the public for the purposes of exercise and recreation pursuant to the provisions of the Open Spaces Act, 1906." The conveyance was recorded by the Charity Commissioners under s. 29 (4) of the Settled Land Act, 1925. The field was managed by a committee of the council. It consisted of football and cricket pitches, two tennis courts, and a garden of remembrance. In consideration of a yearly rent of £85 a federation of football and cricket clubs was granted permission to use the pitches for organised matches, access being open to the public at all times, subject to closing the entrance during the first half of football matches, amounting to about forty hours in a year. The tennis courts were available to the public at a charge during the season, but after 6 p.m. the courts were let to clubs for the exclusive use of their members. The expenses of the upkeep exceeded the total receipts, the excess being made up out of the rates.

HELD, (i) the powers of disposal of land given to local authorities by s. 29 of the Settled Land Act, 1925, and s. 42 of the Town and Country Planning Act 1947, were exercisable by the authorities as trustees, and so could only be exercised, if at all, in conformity with the trusts on which the authorities held the land, and, consequently, the council in the present case could not be regarded as otherwise than bound for the foreseeable future to hold the field on the trusts declared in respect of it in the deed of conveyance.

(ii) although the trusts in question were imposed by deed they were, in effect, statutory trusts inasmuch as the conveyance operated by virtue of s. 10 of the Open Spaces Act, 1906, to impose on the land the statutory obligations prescribed thereby; having regard to those restrictions, the real occupiers were the public; and the sole interest of the local council was as custodians or trustees for the public.

Carnegie Dunfermline Trustees v. Assessor for Dunfermline (1909 S.C. 678), criticised and not followed.

(iii) the question whether there was free and unrestricted use by the public was one of degree, and so a matter of fact to be determined, and, in the absence of some misdirection, conclusively determined, by the Lands Tribunal; on the facts the tribunal was entitled to conclude that such limited exclusion as the council's arrangement with the clubs involved was properly ancillary to their management of the fields as an open space within the meaning of the Act of 1906; and, therefore, the council were not in rateable occupation of the field.

Lambeth Overseers v. London County Council (1897) (61 J.P. 580) applied.

London Playing Fields Society v. Essex (South Western Area) Assessment Committee (1930) (94 J.P. 241) distinguished.

CASE STATED by Lands Tribunal.

The respondent council owned a hereditament comprising a playing field at Downham Market, Norfolk, which was assessed at £10 gross value, and £9 rateable value. On Feb. 25, 1951, a local valuation court of the West Norfolk (No. 2) Local Valuation Panel directed that the assessment should be deleted from the list, holding that the hereditament was not rateable because there was no rateable occupation by the council. The valuation officer appealed to the Lands Tribunal which, on Aug. 28, 1951, dismissed the appeal. The valuation officer appealed.

Sir Arthur Comyns Carr, Q.C., Maurice Lyell and P. R. E. Browne for the valuation officer.

Rowe, Q.C., and D. G. A. Lowe for the respondent council.

Cur. adv. vult.

Feb. 22. **SIR RAYMOND EVERSHED, M.R.**, read the following judgment of the court. By a conveyance dated Dec. 31, 1946, and expressed to be made between Radio Garage Co., Ltd., of the one part, and the urban district council of Downham Market (hereafter referred to as "the council"), of the other part, after reciting that the council was desirous of buying the premises expressed to be thereby conveyed to hold the same in trust for the perpetual use thereof by the public for exercise and recreation pursuant to the provisions of the Open Spaces Act, 1906, or some or one of them, there was conveyed to the council in fee simple the piece of land, rather more than seven acres in extent, called "the cricket field", which is the subject of the present appeal. By cl. 3 of the conveyance the council declared that they "will hold the premises hereby conveyed on the trusts following, that is to say, on trust for the perpetual use thereof by the public for the purposes of exercise and recreation pursuant to the provisions of the Open Spaces Act, 1906." The question is whether the council ought properly to be rated in respect of this field on the ground that they are in beneficial occupation of it, or, at least, are in occupation of it for rating purposes.

The Lands Tribunal answered the question negatively. As appears from the Case Stated, the tribunal found that the land in question was acquired at the end of the 1939-45 war as a war memorial. The decision to acquire it was made at a public meeting at which it was proposed that a suitable form of memorial would be a recreation ground for the use of the public, part of which would be laid out as a garden of remembrance. Subscriptions were called for, and, with the aid of a grant from the Ministry of Education, the sum of £6,000 was raised. This sum of money was spent on buying the land, laying it out, and equipping it as a playing field. The findings of the tribunal also recited that it was decided that the playing field should be owned and managed by the council and that the land was conveyed by the then owners to the council by the conveyance already mentioned, such conveyance being in fact recorded in the books of the Charity Commissioners for England and Wales pursuant to the provisions of the Settled Land Act, 1925. According to further findings, the way in which the field is laid out and used is as follows. At the western side there is a football pitch. During the winter season the pitch is roped off, becoming, in the summer, part of the cricket out-field. There is a cricket table of special turf, roped off except when used. There is a separate concrete practice wicket, and, in the north-eastern corner, a wooden pavilion thirty-six feet by seventeen feet. Near thereto is a gravel car park which can be used free of charge by persons using the playing field. In the northern part of the field are two hard tennis courts wired off, and there is also a putting green, which, however, is falling into disuse. Finally, at the southern end of the field, separated by an evergreen fence, is the garden of remembrance, less than half an acre in extent, where members of the public can sit quietly. As regards management, the tennis courts are let by the season to nine clubs, each having the exclusive use of a court for so many hours after 6 p.m. during the season. At all other times the courts are available to the public at a rate of 2s. 6d. per hour for each court. On Feb. 6, 1951, the council also made an agreement with a body known as the Federation of Downham Town Football and Cricket Clubs, and this agreement has, naturally and properly, assumed considerable importance during the present case. By the agreement the council granted to the federation permission to use the cricket and football pitches and the dressing rooms in the pavilion for the purpose of organised matches according to a fixture list submitted to and approved by the council during a term of two and a half years from Feb. 1, 1951, the federation paying

for such privilege a sum of £85 per annum. The agreement contained the following clause:

"The federation may close the entrance to the field on such dates as are set out in the list of fixtures for the purpose of making a charge for admission to the field and may also make collections on the field on these dates, the closing of the entrance to be subject, however, to granting rights of access to users of the tennis courts, putting green and any other amenities provided by the council on the field."

The practical effect of this clause is found to be as follows in the Case:

"Access is open to the public at all times subject to the exercise by the federation of the rights contained in para. 3 of the agreement of Feb. 6, 1951. In practice, the entrance is closed during the first half of football matches, but not during cricket matches. The closure lasts for about an hour and a quarter for each football match, a total of about forty hours in any year."

It is finally found in the Case that a groundsman is permanently employed by the council and paid by the council, that the expenditure on the field for the year ended Mar. 31, 1950, amounted to £427 17s. 6d. (including the groundsman's wages) and that the income for the same year amounted to £189 18s. 6d., the excess being paid out of the rates, but that the intention is to restrict the amount of the excess to what can be covered by a rate of 4d. or 5d. in the £. On these facts the conclusion of the tribunal was that "the council in the circumstances of the present ownership and use of the land was not in beneficial occupation of the land and was not liable to any rate."

The question for determination may be briefly and conveniently stated by reference to the decision of the House of Lords in the well-known *Brockwell Park* case, *Lambeth Overseers v. London County Council* (1). In that case the park in question had been acquired by the respondent council pursuant to powers in a local Act which laid on them the duty, after acquisition, to hold the park and every part thereof as a park for the perpetual use thereof by the public for exercise and recreation. The House of Lords held that the respondent council was not rateable in respect of it. At the beginning of his opinion LORD HALSBURY, L.C., said (61 J.P. 581):

"I do not think there is here a rateable occupation by anybody. The 'public' is not a rateable occupier . . ."

He had already referred to the private Act of the London County Council (*ibid.*, 629)

" . . . which cast upon them the perpetual obligation to maintain and preserve it [the park] when purchased, as a park for the perpetual use of the public for exercise and recreation."

At the end of his speech LORD HALSBURY, L.C., summed the matter up in these words (*ibid.*, 582):

"Once it has been found, as in this case, that the occupation cannot as a matter of law be a beneficial occupation, there is an end of the question. I say as a matter of law, because that it does not give a beneficial occupation as matter of fact is nothing to the purpose. Here there is no possibility of beneficial occupation to the county council; they are incapable by law of using it for any profitable purpose; they must allow the public the free and unrestricted use of it."

LORD HERSCHELL's opinion was to the same effect (*ibid.*):

"... I am not satisfied that the county council are occupiers of this park for rating purposes, though the legal possession is, no doubt, vested in them. They seem to me to be merely custodians or trustees to hold it and manage it for the use of the public."

The question before this court is whether on its facts the present case falls within the principle of the *Brockwell Park* case (1), and, in particular, the statement of that principle which we have quoted from the speeches of LORD HALSBURY, L.C., and LORD HERSCHELL. We have not so far referred to the terms of the Open Spaces Act, 1906, pursuant to the provisions of which, as will be recalled, the council declared themselves trustees of the field for its perpetual use by the public for the purpose of exercise and recreation. The relevant sections are those numbered 7, 9, 10 and 15, together with the definition of "open space" in s. 20. Section 7 contains a power for corporations and other persons to convey to any local authority any land for the purpose of the same being preserved as an open space for the enjoyment of the public under the Act. Section 9 contains corresponding power for local authorities to acquire open spaces, and to undertake the care, management and control thereof. By s. 10 it is provided that a local authority who have acquired any estate or interest in an open space shall hold and administer the open space in trust to allow, and with a view to, the enjoyment thereof by the public as an open space within the meaning of the Act and under proper control and regulation and for no other purpose, and shall also maintain and keep the open space in a good and decent state. By s. 15 a local authority may, with reference to any open space, make bye-laws for the regulation thereof and of the days and times of admission thereto and for the preservation of order and prevention of nuisances therein. Finally, by s. 20, the expression "open space" is defined to mean any land

"whether inclosed or not, on which there are no buildings or of which not more than one-twentieth part is covered with buildings, and the whole or the remainder of which is laid out as a garden or is used for purposes of recreation, or lies waste and unoccupied."

Before stating our conclusion on the main argument presented to us (which involves some consideration of the scope and effect of the *Brockwell Park* case (1) and which, as we think, turns very largely on the effect of the manner in which the field is in fact used and managed by the council) it is convenient first to deal with two other grounds on which, according to counsel for the valuation officer, the present case is distinguishable from that of the *Brockwell Park* case (1). The first turns on the use by LORD HALSBURY, L.C., of the word "perpetual". In the *Brockwell Park* case (1) the London County Council was enjoined by the relevant local Act to hold such land and every part thereof as a park and preserve the same for the "perpetual" use thereof by the public for exercise and recreation. It does not appear that there was any power under the local Act or otherwise for the London County Council in any circumstances to dispose of the park or otherwise change its use, and there is no doubt that LORD HALSBURY, L.C., in his speech expressly referred to and relied on this obligation of permanence. We find it, however, impossible to think that LORD HALSBURY, L.C., intended to lay it down that this characteristic of permanence, as an obligation for all eternity, was essential to the conclusion that the London County Council was not rateable in respect of the park. As appears in subsequent cases, it has always been recognised that any statutory power or duty is liable to be altered by

(1) 61 J.P. 580; [1897] A.C. 625.

Parliament itself by some later Act, general or special. So much, of course, counsel for the valuation officer conceded. He contended, nevertheless, that the general powers of disposition conferred on local authorities by modern statutes in respect of all land held by them is something altogether different in kind from the possibility of change by future legislation and have, as it were, swept away any characteristic of permanence in cases otherwise comparable with the *Brockwell Park* case (1) whatever may have been the sense in which LORD HALSBURY, L.C., used the word "perpetual". Though he referred to s. 163, s. 164 and s. 165 of the Local Government Act, 1933, counsel did not rely on that statute. He did, however, rely on the tenant for life's powers of sale and other disposition under the Settled Land Act, 1925, vested in local authorities by virtue of s. 29 of that Act, and he relied more particularly on the wide terms of s. 42 of the Town and Country Planning Act, 1947. Having regard, however, to the general tenor and purpose of the Town and Country Planning Act and to the safeguards introduced by s. 42 (2) of that Act, the general powers in that Act cannot, in our judgment, fairly be regarded for present purposes as doing more than applying the modern method of bringing about changes in the use of land vested in local authorities and dedicated in their hands to purposes of the kind here in question in substitution for the older method of special amending legislation. Nor can the Settled Land Act powers be regarded, in our judgment, for present purposes as doing more than providing appropriate conveyancing machinery if and when a local authority, in the proper exercise of its duties, comes to dispose of its land. For, in any case, such powers are powers to be exercised as trustees and can, therefore, only be exercised, if at all, in conformity with the trusts upon which the local authority may hold the relevant land. Notwithstanding these modern statutory powers, therefore, we feel no doubt that the council cannot now be regarded as otherwise than bound for the foreseeable future to continue to hold this field on the trusts declared in respect of it under the deed of 1946. Certainly we think there is no ground on which it can be said (as was said by LORD HEWART, C.J., in *London Playing Fields Society v. Essex (S.W. Area) Assessment Committee* (2)) that the present trusts and uses affecting the field might be merely transitory.

The second point is of the same character, and rests on the fact that in the present case the trusts declared, albeit by reference to the Open Spaces Act, 1906, are declared and established only in, and by the terms of, a voluntary deed. Counsel for the valuation officer did not suggest that any distinction could be drawn between a case where a public body acquired or held land for public uses pursuant to a statutory duty so to do and a case in which such a body held land similarly under a mere statutory power. He contended, however, that the principle of the *Brockwell Park* case (1) has never been, and should not now be, extended to a case where, as here, the trusts arose out of, and only out of, the deed of the parties to it, and in support of this proposition he relied on *London Playing Fields Society v. Essex (S.W. Area) Assessment Committee* (2) and *Carnegie Dunfermline Trustees v. Dunfermline Assessor* (3). The present case is, we think, entirely different from *London Playing Fields Society v. Essex (S.W. Area) Assessment Committee* (2) where the obligations of the society as to the user of the land rested only on its covenant with the other parties to the deed which those other parties could at any time release. In the present case the council declared themselves trustees in perpetuity, and they could not by any means, otherwise than by a statute or by the exercise of statutory power, be

(1) 61 J.P. 580; [1897] A.C. 625.

(2) (1930), 94 J.P. 241.

(3) 1909 S.C. 678.

effectively released from their obligations under the trust, either by the other party to the deed of conveyance or by other person or combination of persons. It is true that in *Carnegie Dunfermline Trustees v. Dunfermline Assessor* (1) a comparable trust created by deed as distinct from statute was held on this ground not to exclude liability to assessment. We are by no means satisfied that this Scottish decision should be followed in England, as we have difficulty in appreciating why the reasoning in the *Brockwell Park* case (2) should not be equally applicable to the trustees of land held for like purposes under a valid charitable trust irrevocably created by deed. We find it unnecessary, however, to express any concluded opinion as to the validity or scope of the distinction sought to be drawn by counsel for the valuation officer, for it is, in our view, plain that the trusts here in question are in effect statutory trusts, inasmuch as the conveyance in the present case operated by virtue of s. 10 of the Open Spaces Act, 1906, to impose on the land the statutory obligations prescribed by that Act to which we have already referred—in short, the duty of allowing it to be used by the public for the purposes of recreation.

We turn, then, to the main question in the case. As appears from the passages from the opinions of LORD HALSBURY, L.C., and LORD HERSHELL which we have quoted, the basis of the decision of the House of Lords in the *Brockwell Park* case (2) was clearly, in our judgment, that, having regard to the restriction imposed on the land by the special Act and to the facts of the case, the real occupiers were the public and the sole interest of the London County Council was as "custodians or trustees" for the public. We have already stated our view that the present case is not distinguishable from the *Brockwell Park* case (2) on the ground of any impermanence in the uses and trusts now affecting the playing field in question. Nor, in our opinion, are the restrictions imposed by the Open Spaces Act, 1906, materially different from those imposed by the special Act in the *Brockwell Park* case (2) and there held to have the effect of excluding the London County Council from rateable occupation. If, therefore, the matter is judged solely by reference to the terms and legal effect of the statutory restrictions, this case is in effect concluded in favour of the council by the *Brockwell Park* case (2).

It remains, however, to consider whether the facts regarding the actual user of the land in the present case involve such a departure from the obligation succinctly described by LORD HALSBURY, L.C., in the phrase "they must allow the public the free and unrestricted use of it" as to justify the conclusion that, whatever their legal obligations in the matter may be, the council have in fact assumed the character of rateable occupiers of the land in question. It is not suggested that "free and unrestricted use" by the public means that the public, that is, any member of the community who chooses so to do, must be free to go on the land at any time of the day or night. A right for a local authority, or for any other body charged with the duty of holding and managing an open space or park for the public use, to close such a place at night, for example, must clearly be ancillary to, if not, indeed, essential for, good regulation. The terms of the Open Spaces Act, 1906, themselves indicate that a right of closure as such is not inconsistent with dedication for public recreation. In the *Brockwell Park* case (2) itself there were certain portions of the land from which the public was necessarily excluded—those portions occupied by a keeper's lodge, the bandstand, and a refreshment building. These exclusions are the manifestations of the duty and exercise of management, and their total area compared with

(1) 1909 S.C. 678.

(2) 61 J.P. 580; [1897] A.C. 625.

that of the whole park was negligible. In the later case of *Liverpool Corpn. v. West Derby Assessment Committee* (1), a similar question of rateability arose as regards the plaintiff corporation's occupation of a park of eighty-nine acres. By their local Act and bye-laws made thereunder the corporation were empowered to close the park for not more than seven days in any year, and, on these occasions, to make charges for admission. The power had, in fact, been exercised from time to time, though rarely, for the purpose of fetes in aid of a local hospital. On these occasions the corporation did not themselves make any charge for admission, but the persons who were permitted to use the park did so. It was argued that these facts distinguished *Liverpool Corpn. v. West Derby Assessment Committee* (1) from the *Brockwell Park* case (2), but this court found no difficulty in concluding that the Liverpool Corporation's power of exclusion and its exercise were merely ancillary to the dedication of the land as a public park: see per FLETCHER MOULTON, L.J. ([1908] 2 K.B. 667).

In the present case it is said that, whatever be in strictness the trusts and duties imposed on the council, they are, in fact, so managing the field that the public is to a substantial extent excluded from its use for the purposes of recreation. If he may, perhaps, have deliberately over-stated it, yet counsel for the valuation officer put his case effectively and not unfairly when he said that the council was using the field to all intents and purposes for the benefit of a number of athletic clubs. And if that summary of the situation is justified, then, according to the argument, the case falls outside the scope of the *Brockwell Park* decision (2) and becomes analogous to the *London Playing Fields Society v. Essex (S.W. Area) Assessment Committee* (3), and to *North Riding of Yorkshire County Valuation Committee v. Redcar Corpn.* (4), where it was held that a local authority, who owned a considerable area near the foreshore and used and managed it substantially as an amusement park, were rateable in respect of their occupation of it.

It cannot, we think, be denied that the incidents of the council's management of the field in question involve a somewhat greater degree of exclusion of its free and unrestricted use by the public than was the case of the park occupied by the corporation in *Liverpool Corpn. v. West Derby Assessment Committee* (1). Still, in our judgment, the question is one of degree and, therefore, a matter of fact to be determined, and, in the absence of some misdirection, conclusively determined, by the Lands Tribunal. We accept the submission of counsel for the council that in modern times provision for some form of organised athletics, the spectacle of which may be enjoyed by the public, is not inconsistent with a duty to provide for recreation by the public, and in the present case the sum total of the extent to which members of the public are excluded from free entry into the field forms a minute fraction of the total hours of daytime throughout the year. As we have already stated, we do not think the use by LORD HALSBURY, L.C., of the words "free and unrestricted use" involve the proposition that any member of the public can at all times, when the field or open space is not wholly closed in accordance with proper regulation and good management, gain access to the field at his will without payment. Put another way, we think that the tribunal was entitled on the facts of this case to conclude that such limited exclusion as the council's arrangements with the cricket and football clubs and the tennis clubs involved is properly ancillary to their management of the field as an open space within the meaning of the Open Spaces Act, 1906.

(1) 72 J.P. 397; [1908] 2 K.B. 647.

(2) 61 J.P. 580; [1897] A.C. 625.

(3) (1930), 94 J.P. 241.

(4) 106 J.P. 11; [1942] 2 All E.R. 589; [1943] K.B. 114.

We will assume in favour of the valuation officer that the matter should be decided by reference to the user in fact rather than by reference to the trusts imposed on the council, but we think that the same conclusion results. We add, however, that, in our judgment, the arrangements which the council have made do not involve any departure from strict compliance with the trusts to which they are subject.

There remains one further question. In the course of their speeches in the *Brockwell Park* case (1) both LORD HALSBURY, L.C., and LORD HERSHELL undoubtedly expressed themselves as basing their conclusions not only on their view that the London County Council were mere trustees and custodians for the public, but also (applying a recognised test for rateability) on the fact that, having regard to the statutory restrictions attaching to that park, no tenant would in any circumstances give anything at all for the privilege of an occupation which could not provide the capacity to earn more than the rent which such a tenant would be called on to pay. In the present case it was argued alternatively on behalf of the council that, even though the council could not be regarded as mere custodians for the public, still, in the circumstances, no tenant could ever be found to pay a penny piece for the privilege of a tenancy of the field in question, and, accordingly, that its rateable value must be nil. This argument is but an expansion of the forceful phrase of BOWEN, L.J., in an earlier case—*Reg. v. West Bromwich School Board* (2)—“struck with sterility”. For our part, we agree with the view expressed by DARLING, J., in *Liverpool Corpn. v. West Derby Assessment Committee* (3), that, however attractive and apposite such language may have been on the occasion that it was used, it is somewhat dangerous to rely on it, at least without a careful consideration of its true significance. In the *Brockwell Park* case (1), having regard to the terms of the relevant statute, we think that LORD HALSBURY, L.C., and LORD HERSHELL, in referring to the fact that no tenant would pay anything for the right of occupying the land, were really expressing in a different way the same point involved in their conclusion that, in truth, the public were the occupiers, for the absolute duty to use and manage the park for the “free and unrestricted use of the public” attached in whatever hands the estate or interest in the land was vested. If, however, it is once conceded in the present case that the council are not mere trustees or custodians for the public, and once it is also conceded that they are not bound to hold and manage the field for the purposes of recreation by the public, it seems to follow that the restrictions affecting the land must be regarded as so qualified that we are not for ourselves satisfied that it could be fairly said “no one would pay a penny piece for the privilege of becoming its tenant”. It must now be taken as well settled to be no answer to a claim to rateability that land is held on such terms that its owner cannot in fact derive any pecuniary benefit thereout. We prefer, therefore, to express no view on this branch of the council’s argument, but to rest our conclusion on the view we have earlier expressed, namely, that on the facts of the present case the tribunal was entitled to conclude, as it did, that the council were mere trustees or custodians for the public, and, accordingly, that the real occupiers for present purposes are the public themselves. *Appeal dismissed.*

Solicitors: *Solicitor of Inland Revenue* (for the valuation officer); *Peacock & Goddard*, agents for *Reed, Wayman & Walton*, Downham Market (for the council).

F.G.

(1) 61 J.P. 580; [1897] A.C. 625.

(2) (1884), 48 J.P. 808; 13 Q.B.D. 929.

(3) 72 J.P. 397; [1908] 2 K.B. 647.

KING'S BENCH DIVISION

(LORD GODDARD, C.J., BYRNE AND PARKER, JJ.)

Jan. 23, 24, 1952

DUPLEX SETTLED INVESTMENT TRUST, LTD. v. WORTHING BOROUGH COUNCIL

Housing—Limitation of rent—Flat constructed under building licence—Breach of condition of licence—Obligation to repair placed on tenant—Consideration other than the payment of a money rent—Expression in terms of money—Modification of rent—Building Materials and Housing Act, 1945 (9 and 10 Geo. 6, c. 20), s. 7 (1), (4), (7) (b).

A licence was granted under the Defence (General) Regulations, 1939, reg. 56A, to the predecessor in title of the appellants for the building of a block of flats on the condition that each flat was to be let at a rental not exceeding £85 per annum exclusive of rates, that the owners maintained and kept in repair the buildings free of charge to the tenants, and laid out turf, planted trees, and maintained the gardens and private roadway, these provisions to be incorporated in the tenancy agreements. One flat was let at a rental of £85, and in the tenancy agreement the tenant undertook to maintain and keep the interior of the demised premises in good tenantable repair and condition, to maintain and keep a garden at the rear of the premises in good condition, and to pay, in addition to the rent, a fire insurance premium amounting to £1 4s. 11d. per annum. On a prosecution of the appellants by the respondents, the local authority, under s. 7 (1) of the Building Materials and Housing Act, 1945, for letting the flat at a rent in excess of the permitted rent, the justices convicted the appellants, assessed the annual value of the conditions imposed on the tenant at £12, and reduced the rent to £73 per year.

HELD: no question of a claim of right by the appellants arose to oust the jurisdiction of the justices because by s. 7 (1) the question whether the appellants were entitled to do what they did was expressed to be solely for the justices to determine; the flat had been let for a consideration which consisted partly of payments other than the payment of the rent within s. 7 (4) of the Act; the whole consideration was capable of being expressed in terms of money; and, therefore, the justices were entitled to assess the total value of the consideration in accordance with the evidence before them, to convict the appellants of an offence under s. 7 (1), and, under s. 7 (7) (b), to make such modifications of the terms of the letting as were necessary to secure that the rent payable in future did not exceed the permitted rent.

CASE STATED by Worthing (Sussex) justices.

On June 27, 1951, at a court of summary jurisdiction sitting at Worthing, an information was preferred by the respondents, the local authority, charging that the appellants had unlawfully let flat No. 29, Shirley Close, Worthing, one of a block of flats constructed under the authority of a building licence, dated Dec. 11, 1946, which was granted subject to a condition limiting the rent, at a rent in excess of the permitted rent, contrary to s. 7 of the Building Materials and Housing Act, 1945. The justices found the charge proved, fined the appellants £10, and ordered that the rent payable be amended to the sum of £73 a year and that £6 out of the fine be paid to the tenant. The appellants appealed to the Divisional Court.

Lloyd-Jones, K.C., and L. F. Sturge for the appellants.

Glyn-Jones, K.C., and S. Rees for the respondents.

PARKER, J., delivered the following judgment of the court. This is an appeal by way of Case Stated from a decision of the justices sitting for the petty sessional division of Worthing, who convicted the appellants of letting a house, namely, flat No. 29, Shirley Close, Worthing, at a rent in excess of the rent limited

by a building licence, contrary to s. 7 of the Building Materials and Housing Act, 1945. Section 7 (1) provides:

"Where a house has been constructed under the authority of a licence granted for the purposes of a Defence Regulation (hereinafter referred to as 'a building licence') and the licence, whether granted before or after the passing of this Act, has been granted subject to any condition limiting . . . the rent at which it may be let, any person who, during the period of four years beginning with the passing of this Act . . . lets or offers to let the house at a rent in excess of the rent so limited . . . shall be liable on summary conviction to a fine not exceeding the aggregate of—(a) such amount as will in the opinion of the court secure that he derives no benefit from the offence; and (b) the further amount of one hundred pounds; or to imprisonment for a term not exceeding three months, or to both such fine and such imprisonment."

It should be noted that the period of four years mentioned has now been extended by the Housing Act, 1949, s. 43 (1), to eight years. Section 7 (4) provides:

"Where a house is let for a consideration which consists wholly or partly of something other than the payment of a money rent for the house, and it appears to the court that the whole consideration is capable of being expressed in terms of money, the court shall assess the total value of the consideration upon the assumption that the transaction is carried out in accordance with its terms, and shall determine a rent which appears to the court to represent a benefit equivalent to the said total value, and the rent so determined shall be deemed for the purposes of this section to be the rent at which the house was let."

Section 7 (7) provides:

"Where proceedings are taken for an offence against this section, the court shall have the following powers, that is to say . . . (b) where any person is convicted of the offence of letting a house at a rent in excess of the permitted rent, the court may, if the interest created by the letting has not expired at the time of the conviction, make such modifications of the terms and conditions of the letting as in the opinion of the court are necessary for the purpose of securing that the rent payable in respect of periods falling after the date of the conviction does not exceed the permitted rent."

Section 8 (2) provides:

"It shall be the duty of every local authority to take such measures as they think necessary for securing the enforcement, in relation to houses within the area of the authority, of the provisions of this Act relating to the permitted price and permitted rent for houses."

In passing, it is to be observed that in s. 9 (3), the interpretation section, it is provided that the expression "house" includes a flat.

What happened in this case was this. On Dec. 11, 1946, the Minister of Works granted a licence under reg. 56A of the Defence (General) Regulations to Messrs. S. A. Gregory (Property Investment), Ltd., who were the predecessors in title of the appellants, for the sum of £51,840 for the building of a block of flats at Worthing. The conditions attached to that licence, so far as they are material, were as follows:

"(2) The flats to be let at a rental not exceeding £85 per annum, exclusive of rates. (3) The owners for the time being to maintain and keep in repair

the buildings free of charge to the tenants, and to lay out turf and plant with flowering trees and shrubs and maintain the gardens and private roadway, such provisions to be incorporated in the tenancy agreements."

The block of flats was duly built, and at some stage the appellants acquired the property from Messrs. S. A. Gregory (Property Investment), Ltd. By an agreement dated Dec. 18, 1950, the appellants let one of the flats, No. 29, to a Miss Smith for the period of one week from Oct. 23 to Oct. 31, 1950, and thereafter from month to month. The rent payable was a rent of £7 1s. 8d. a month, which is £85 a year, the rent specified in the licence. It is to be observed in passing that, though the period of that tenancy, on the face of it, could be a very short one, the premises are subject to the Rent Restrictions Acts. The agreement provided that the tenant was to maintain and keep the interior of the demised premises and all fixtures and fittings therein in good tenantable repair and condition. It also provided that the tenant was to cultivate, maintain, and keep in good condition a garden at the rear of the demised premises allotted by the appellants, keeping the grass regularly cut and the garden free from weeds. It is provided that the appellants were to keep the demised premises insured against fire, but it was provided also that the tenant was, by way of additional rent, to pay to the appellants a sum equal to the amount paid by him for effectuating and maintaining the insurance.

The justices held that those three obligations on the part of the tenant constituted benefits to the appellants as landlords and formed part of the consideration for the letting of the flat. They further held that that consideration was capable of being expressed in money and assessed such benefits at the sum of £12. Accordingly, the total rent payable was determined by them to be the sum of £97, which exceeded the £85 limited by the licence, with the result that they found the offence proved and fined the appellants £1. Further, in exercise of their powers under s. 7 (7) of the Act, they amended the rent for the future to a rent of £73, being the rent of £85 less the sum of £12.

A number of points have been raised on the part of the appellants before this court. It is said, in the first place, that the acts of the appellants complained of were done in the exercise of a bona fide claim of right, thus ousting the jurisdiction of the justices. It is not necessary to deal in detail with this contention. It is sufficient to say that, in the view of this court, no question of claim of right arises in such a case as this. Whether there is any right in the appellants to do what they did depends solely on the construction of the Act, and that is expressly a matter for the justices to determine. Moreover, it is to be observed that the only provision in this statute for the determination of the matter is that it should be determined summarily, and, if the appellants' argument were correct, it would appear that the matter could never be dealt with at all.

It is further said that the covenant put on the tenant to keep the premises in tenantable repair is a usual covenant to be imposed on a tenant and that condition 3 of the licence applies only to structural, as opposed to decorative and interior, repair, and itself contemplates that the limit of £85 is to be for a letting under which the tenant is to be responsible for interior repair. In our opinion, however, there is no reason to give condition 3 the limited meaning suggested. Though not very happily worded, it must be remembered that what the licence was dealing with was a block of some forty flats. Bearing that in mind, it would seem that the ordinary meaning of condition 3 is that the owners were to be responsible for maintaining and keeping in repair those flats free of charge to the tenant, including both inside and outside repair. On that basis and on that interpretation it is to be observed that the appellants have not only

failed to incorporate those terms in any tenancy agreement, as they were required to do, but they have, in fact, expressly put on the tenant a covenant to keep the interior in tenable repair, an obligation on him which, in our view, is clearly for the benefit of the appellants.

With regard to the further obligation on the tenant to reimburse the amount of the insurance premium, the matter seems almost unarguable in view of condition 3, because under condition 3 it was a condition of the licence that the landlord himself should bear the cost of repair free of all charge to the tenant. Further, as regards the covenant to maintain in good condition the land in the rear of the premises, while this was, no doubt, primarily for the benefit of the other tenants, it seems impossible to say that it was not of some benefit to the appellants as maintaining the amenities of the premises as a whole.

However, it is said on behalf of the appellants that, even if these obligations which are put on the tenant were part of the consideration of the letting, that part of the consideration applicable to them is not capable of being expressed in terms of money. So far as the obligation to reimburse the insurance premium is concerned, it is clearly impossible to advance such an argument. The obligation is expressed to be the amount of the premium, a liquidated sum, in this case £1 4s. 11d. As regards the other obligations, the consideration, though it may be difficult to assess, is clearly capable of being expressed in terms of money.

Finally, it is said on behalf of the appellants that at any rate the justices have assessed the consideration on a wrong basis. The justices had evidence before them that the insurance premium was £1 4s. 11d. They further had the evidence of a surveyor to the effect that to do the necessary painting, distemper, and the like, and to keep the interior in tenable repair would cost the tenant £13 7s. a year. He also gave evidence that to maintain the small patch of garden at the rear, the tenant would have to get a labourer or jobbing gardener half an hour a week at a cost of 1s. 6d., a total cost in the year of £3 18s. No evidence was given on behalf of the appellants. If the justices accepted those sums as the measure of the consideration, it may be that some criticism could fairly be levelled at them. Thus, for example, it might be said with some force that the cost of maintaining the little back garden was not necessarily the value of the benefit to the landlord—indeed, the value was probably so little that the principle of *de minimis* would apply. The justices, however, did not accept in full the evidence which was put forward because, although the figures adduced by the surveyor in his evidence were more than £18, they reduced that figure to £12. In those circumstances it is difficult to see how it can be said that they erred in law in fixing such a figure. Finally, the justices amended the rent to £73. It is true that under s. 7 (7) they had power, if they chose, to modify the covenants dealing with repair, but they chose not to do that but merely to modify the rent. It seems to this court that in doing so they were clearly acting within their powers, and, again, it cannot be said that they erred in law. In those circumstances, therefore, this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Mead, Sons & Bingham* (for the appellants); *Sharpe, Pritchard & Co.*, agents for *E. G. Townsend*, town clerk, Worthing (for the respondents).

F.G.

CENTRAL CRIMINAL COURT

(McNAIR, J.)

Feb. 14, 18, 1952

REG. v. TRONOH MINES, LTD., AND OTHERS

*Elections—Expenses—Advertisement “promoting . . . election of . . . candidate”
—Criticism of political party in general—Representation of the People Act,
1949 (12 and 13 Geo. 6, c. 68), s. 63 (1) (b).*

After writs had been issued in respect of a parliamentary general election a company, though its secretary, caused to be inserted in a newspaper circulating throughout the country an advertisement condemning the financial policy of the Labour Party, and, in particular, that party's proposal to control the dividends of companies. The advertisement continued: “The coming general election will give us all the opportunity of saving the country from being reduced, through the policies of the Socialist government, to a bankrupt ‘Welfare State’. We need a new and strong government with Ministers who may be relied upon to encourage business enterprise and initiative . . .” The company, the secretary, and the proprietors of the newspaper, were jointly charged with unlawfully incurring expenses with a view to promoting or procuring the election of a candidate other than the Labour candidate at the parliamentary election to be held in the constituency in which the company had its office and the newspaper was published, contrary to s. 63 (1) (b) and s. 63 (5) of the Representation of the People Act, 1949.

HELD: section 63 (1) (b) was designed to prohibit expenditure on advertisements supporting a particular candidate in a particular constituency, which, if authorised by the election agent, would form part of the election expenses for that constituency, as distinct from supporting the interests of a party generally in all constituencies, and, therefore, there was no case to go to the jury.

SUBMISSION ON POINT OF LAW on a charge under the Representation of the People Act, 1949, s. 63 (1) (b).

On Oct. 19, 1951, the defendant, Tronoh Mines, Ltd., by its secretary, the defendant, Harold Edgar Barrenger, caused to be inserted in a newspaper owned by the defendants, The Times Publishing Co., Ltd., an advertisement which was headed “Tronoh—Malayan Tin Group of Companies. Interim statement on dividend limitation,” and contained criticisms of the Labour Party's financial policy—in particular, that relating to a proposal to control the dividends of companies. The advertisement concluded with these words:

“The coming general election will give us all the opportunity of saving the country from being reduced, through the policies of the Socialist government, to a bankrupt ‘Welfare State’. We need a new and strong government with Ministers who may be relied upon to encourage business enterprise and initiative, under the leadership of one who has, through the whole of his life, devoted himself to national and not sectional interests . . .”

The three defendants were charged under s. 63 (1) (b) and s. 63 (5) of the Act of 1949 that in the city of London they unlawfully incurred expenses on account of issuing in the “The Times” newspaper an advertisement with a view to promoting or procuring the election of a candidate other than the Labour Party's candidate at the parliamentary election held in the constituency of the cities of London and Westminster during the general election on Oct. 25, 1951, for which the writ had been issued on Oct. 6. By a second count it was alleged that the expenses were incurred with a view to promoting or procuring the election of the Conservative candidate in the constituency referred to. At the conclusion of the case for the prosecution the defendants submitted that for an advertisement to offend against s. 63 (1) (b) it must be directed to a particular candidate in a particular constituency and not be in the general terms of the advertisement complained of, and that, as the prosecution had not tendered any evidence to

that effect, there was no case to go to the jury against the defendants who were entitled to be acquitted.

Winn and H. E. Perkins for the Tronoh Mines, Ltd., and Mr. Barrenger.
Howard, Q.C., and *J. M. G. Griffith-Jones* for The Times Publishing Co., Ltd.
Christmas Humphreys and *Bass* for the Crown.

McNAIR, J.: On the view I take of the construction of s. 63 (1) of the Representation of the People Act, 1949, this is not a case which I can properly leave to the jury. For the purpose of the observations which I am about to make, I assume that the jury could properly find on the evidence that the object, or, possibly, the primary object, of incurring the expenditure in question was to advance the prospects of the anti-Socialist cause generally, that those who incurred those expenses had in mind the general election of 1951, and that they desired to achieve their object by securing the election of a majority of candidates who were against the Socialist government, though, if the matter had been left to the jury, the jury might well have taken the view that they were not the objects or the primary object. The indictment contains two counts, charging the defendants with acting contrary to s. 63 (1) (b) and s. 63 (5) of the Act of 1949.

The Act of 1949 is a consolidating statute embracing the whole of the electoral law. So far as is material, s. 63 (1) provides:

"No expenses shall, with a view to promoting or procuring the election of a candidate at an election, be incurred by any person other than the candidate, his election agent and persons authorised in writing by the election agent on account—(a) of holding public meetings or organising any public display; or (b) of issuing advertisements, circulars or publications; or (c) of otherwise presenting to the electors the candidate or his views or the extent or nature of his backing or disparaging another candidate . . ."

Counsel for the defendants have submitted that, on the proper or reasonable construction of that section, the evidence tendered by the Crown does not establish any act which is prohibited by it. Section 63 (1) prohibits the incurring of expense on account of (a) holding public meetings, (b) issuing advertisements, or (c) "otherwise presenting to the electors the candidate or his views or the extent or nature of his backing or disparaging another candidate". It seems to me that (c) necessarily imports that the particular items specified in (a) and (b) must also, if they are to be caught by the prohibition, be items which have the effect of "presenting to the electors the candidate or his views or the extent or nature of his backing or disparaging another candidate." If this result had not been intended, it seems to me that para. (c) would have run: "of presenting to the electors, whether by means specified in para. (a) or para. (b), or in any other way, the candidate or his views . . ." Furthermore, the Interpretation Act, 1889, s. 1 (1), provides that, unless the context otherwise requires, words importing the singular include the plural, and I think that the context here does necessarily require that references to the election of a candidate at an election means a candidate at a particular election and not candidates at elections generally. On the whole, therefore, although I appreciate that the point is fully arguable, I think that the construction contended for by the defence on this point is correct. It is not, however, necessary in a criminal case such as this to go to that length. It is sufficient to say that, in my judgment, it is a reasonable and possible construction. For, in the construction of a penal statute—to use the words of LORD SIMONDS in *Howell v. Falmouth Boat Construction, Ltd.* (1)—

"a man should not be put in peril on an ambiguity."

(1) [1951] 2 All E.R. 278; [1951] A.C. 837.

I have reached the decision that on the evidence no reasonable jury could find that the advertisement in question was presenting to the electors of any constituency any particular candidate, still less presenting to the electors of the constituency of the cities of London and Westminster either the Conservative candidate or any candidate other than a Socialist candidate or his views.

Counsel for the defendants, Tronoh Mines, Ltd. and Mr. Barrenger, also contended that this construction is supported by the consideration that s. 63 (1) does not prohibit the incurring of expenditure of the nature covered by the section absolutely, but only sub modo, and, therefore, the fact that the section itself provides no way in which the particular form of advertisement in question, namely, an advertisement in a national newspaper, which circulates generally throughout the country, supporting the views of a particular party and not those of a particular candidate, can be authorised, lent strong support to the view that the particular form of advertisement in question was not prohibited. If expenses incurred on account of the items specified in (a) (b) and (c), being supported in writing by the election agent, are permissible and authorised by the election agent, then, by virtue of sub-s. (2), the person who incurs them has to make a return to the returning officer of the amount of those expenses, stating the election at which and the candidate in whose support they were incurred. The prescribed form referred to in sub-s. (3) is set out in the Representation of the People Regulations, 1950 (S.I., 1950, No. 1254), which took effect after approval by resolution of both Houses of Parliament, and is Form W., and it is clear that that form is inappropriate for making a return of expenses of the kind with which we are here concerned. There is no way in which the expenditure, on the hypothesis I have stated, incurred in relation to all elections can be apportioned for the purpose of any particular return for a particular election. That consideration alone seems to me to lend strong support to the view that the section is not intended to prohibit expenditure incurred on advertisements designed to support, or having the effect of supporting, the interest of a particular party generally in all constituencies, at any rate at the time of a general election, and not supporting a particular candidate in a particular constituency.

Counsel for The Times Publishing Co., Ltd. has based an argument on the general structure of the group of sections—ss. 60 to 78—headed “Election expenses”. Those words, “Election expenses”, are, according to recognised canons of construction, to be regarded as forming part of the statute itself, and may, at any rate in the case of doubt, but, probably in all cases, be used to provide the key to the general construction of each section which follows under that heading. Election expenses are defined in s. 103 as follows:

“ ‘Election expenses’ in relation to an election means expenses incurred, whether before, during or after the election, on account of or in respect of the conduct or management of the election.”

The result of s. 171 (1) is that “election” here means a parliamentary election, and that term “parliamentary election” is itself defined by s. 17 (1) of the Interpretation Act, 1889, in terms which make it plain that it means an election for a particular constituency and not a panoply of elections commonly known as a general election. Accordingly, it seems to me that this group of sections is dealing with an election for a particular constituency, and it would be contrary to the ordinary canons of construction to impose the prohibition of s. 63 (1) in the circumstances of the present case. In other words, what is prohibited by this section is the incurring of expenditure of one of these particular categories which has the effect of supporting a particular candidate or candidates in a particular constituency, which, if authorised by the election agent, would form

part of the election expenses for that constituency and thus be subject to the statutory maximum of expenditure for that constituency. I, therefore, accept the submission of counsel for The Times Publishing Co., Ltd. that s. 63 (1) does not prohibit expenditure, the real purpose or effect of which is general political propaganda, even although that general political propaganda does incidentally assist a particular candidate among others. There may be instances where there has been an incursion by a party or body into an election, but there is no evidence or suggestion of anything of that kind in the present case. Certain of the cases to which I have been referred (including *Lambeth, Kennington Division Case*, *Crossman v. Davis* (1) and *Shoreditch, Haggerston Division Case*, *Cremner v. Loules* (2)), draw this distinction, and, although those were decisions on earlier legislation, it does not seem to me that in any relevant respects their validity has been altered by the Act of 1918, the Act of 1948, or the consolidated Act of 1949.

I have come to the conclusion that no reasonable jury could find that the expenditure in question here was prohibited on this construction of the Act. That being so, I need not pause to consider the special position of the third defendants, The Times Publishing Co., Ltd., and the question whether, on any view of the statute, it could be said that there was any evidence against them. Furthermore, the conclusion which I have reached on the general construction of the section renders it unnecessary for me to express any final view on the question whether the proof of intention, object, or view to promote or procure the election of candidates generally of one particular party or in opposition to one particular party in all elections held at one general election could be sufficient evidence, on which a jury could act, of specific intent such as is charged in the present case, viz., the intent of promoting or procuring the election of a particular candidate or candidates at a particular election. But I must say, having listened to the arguments on this point, I am strongly of the opinion that in a case such as this it would be necessary to prove affirmatively the specific intent relating to the particular election.

Verdict: "Not Guilty" on both counts.

Solicitors: *Stephenson, Harwood & Tatham* (for the first and second defendants); *Charles Russell & Co.* (for the third defendant); *Director of Public Prosecutions* (for the Crown).

G.F.L.B.

- (1) (1886), 54 L.T. 628.
(2) (1896), 5 O'M & H. 68.

HOUSE OF LORDS

(LORD PORTER, LORD GODDARD, LORD OAKSEY, LORD MACDERMOTT AND LORD TUCKER)

Dec. 3, 4, 5, 6, 1951, Feb. 25, 1952

EARL FITZWILLIAM'S WENTWORTH ESTATES CO. v. MINISTER OF HOUSING AND LOCAL GOVERNMENT AND ANOTHER

Compulsory Purchase—Building land—Compulsory purchase by Central Land Board—Power of board to acquire land for disposal for permitted development—Planning permission granted by local authority to prospective lessee—Owner unwilling to sell at existing use value—Town and Country Planning Act, 1947 (10 and 11 Geo. 6, c. 51), s. 43 (1).

The appellants, who were the owners of a plot of land, offered to grant to R., who wished to build a house on it, a three hundred years' lease thereof at an annual

rent which exceeded the existing use value of the plot and to assign to him the benefit of the appellants' claim for compensation for loss of development rights under the Town and Country Planning Act, 1947, R. to pay the development charge under the Act. Permission to build the house was granted to R. by the local authority. On a request by R. that a compulsory purchase order should be made for his benefit because the appellants did not propose to lease the land at the existing use value, the Central Land Board wrote to the appellants asking them whether they would be prepared to adopt one of three methods of disposing of the land. The methods, which the board considered fair to buyers who wanted a house immediately, were set out in a document entitled "House 1", and were: (i) to sell the land at existing use value, the buyer paying development charge, (ii) the seller to pay the development charge, and then to sell the land at a fair price, including the development charge; or (iii) the seller to pay the development charge, erect the house and then sell the house and land at a fair price, including the development charge. The appellants refused to adopt any of these methods, and the board then tried to negotiate with them a purchase by agreement. The existing use value of the land was £35, but the appellants would only agree to sell it at £462 (its probable value if it were developed). As they were unable to acquire the land by agreement on what they considered to be reasonable terms, the board resolved to acquire it compulsorily, and on June 22, 1949, an order to that effect was made under s. 43 (2) of the Act of 1947 and was confirmed by the Minister of Town and Country Planning on Dec. 3, 1949. On an application to the court by the appellants for an order that the compulsory purchase order and the Minister's confirmation order be quashed, the appellants contended (*inter alia*) that the functions of the board were limited to the assessment and collection of development charges and did not extend to the acquisition of land for the purpose of development, and, further, that the action of the board prevented the assignment by the appellants under s. 64 (2) of their right to receive compensation, and, therefore, the order was invalid as it was made for a purpose not authorised by s. 43 (1).

HELD: on the true construction of s. 43 (1) of the Act of 1947, the purpose referred to in the second part of the sub-section introduced by the words "in particular" was a "purpose connected with the performance of [the board's] functions" within the meaning of the first part of the sub-section, and, therefore, the board, in acquiring the land compulsorily for the purpose of disposing of it to R. for development, were acting within their powers, even though by so doing they were limiting the appellants' right of assignment under s. 64 (2) of the Act.

Decision of COURT OF APPEAL (1951) (115 J.P. 309), affirmed.

APPEAL by Earl Fitzwilliam's Wentworth Estates Co. from an order of the Court of Appeal (SOMERVILLE, SINGLETON, L.J.J., DENNING, L.J., *dissentiente*), dated Apr. 13, 1951, and reported [1951] 1 All E.R. 982, affirming an order of BIRKETT, J., dated July 31, 1950, and reported [1950] 2 All E.R. 765, whereby he refused to make an order quashing a compulsory purchase order made by the Central Land Board on June 22, 1949, and a confirmation order made by the Minister of Town and Country Planning* on Dec. 3, 1949.

The appellants were the owners of large estates in Sheffield which they had been developing for some years by leasing plots of land on building leases for a term of three hundred years. In August, 1948, they informed the prospective lessee of one of the plots of the terms on which they would grant a lease to him. The prospective lessee, who had obtained permission from the local authority to build a house on the land, wrote to the Central Land Board complaining that the appellants did not propose to lease the land at present use value, and asking if the board would make a compulsory purchase order for his benefit. The board drew the appellants' attention to three methods of disposing of the land which they considered fair to buyers and asked the appellants if they were

* By art. 1 (1) of the Minister of Local Government and Planning (Change of Style and Title) Order, 1951 (S.L., 1951, No. 1900), which came into operation on Nov. 3, 1951, the style and title of the Minister of Local Government and Planning conferred on the Minister of Town and Country Planning by the Transfer of Functions (Minister of Health and Minister of Local Government and Planning) (No. 1) Order, 1951, was changed to the Minister of Housing and Local Government.

prepared to accept one of these methods. The appellants replied that they were not, and on June 22, 1949, the board made a compulsory purchase order in respect of the land. On Dec. 3, 1949, the order was confirmed by the Minister of Town and Country Planning. The appellants contended that the order was not within the powers conferred on the board by the Town and Country Planning Act, 1947, s. 43 (1) and s. 43 (2), because its object was to compel the appellants to conform to the board's policy that land should not be sold at a price greater than its existing use value and it was made as a reprisal for the appellants' refusal to conform to the methods of sale suggested to them. They also contended that the power conferred by the second part of s. 43 (1), viz., the power to acquire land for the purpose of disposing of it for development for which permission had been granted under the Act, was limited by the power conferred by the first part of the sub-section, and, therefore, it was a power exercisable only in connection with the performance by the board of their functions under the Act (viz., the ascertainment of development values and the determination of development charges), and was not a separate and independent power. It was further argued that the action of the board deprived the appellants of the benefit of their rights under s. 64 (2) in that they could not transmit their right to payment as a term of the agreement to sell the property in respect of which their right to payment arose. The respondents, the Minister and the board, contended that the action of the board was taken in exact accordance with the terms of the Act, in that they were unable to acquire the land by agreement on reasonable terms and that they, therefore, acquired it compulsorily for a purpose connected with the performance of their functions under the Act, and, in particular, for the purpose of disposing of the land for development for which permission had been granted.

BIRKETT, J., held that the power given to the board by the second part of s. 43 (1) was not limited by the earlier words of the sub-section, but was wide enough to allow the board to make the compulsory purchase order in the circumstances of the case, and, therefore, the order was valid. The Court of Appeal held that on the true construction of s. 43 (1) the second part of the sub-section did not confer on the board a power wholly independent of the first part of the sub-section, but was introduced to make it clear that the power of the board to acquire land for the purpose mentioned in the second part was a purpose connected with the performance of the board's functions under the Act within the opening words of the sub-section.

Simon, Q.C., and J. H. Barrington for the appellants.

Sir Hartley Shawcross, Q.C., J. P. Ashworth and R. J. Parker for the respondents.

The House took time for consideration.

Feb. 25. The following opinions were read.

LORD PORTER: My Lords, this is an appeal from an order of His Majesty's Court of Appeal in England (SOMERVELL, SINGLETON and DENNING, L.J.J.), dated Apr. 13, 1951, affirming an order made by the King's Bench Division (BIRKETT, J.) on July 31, 1950, in favour of the respondents, whereby the appellants' motion to quash a compulsory purchase order made by the Central Land Board on June 22, 1949, and a confirmation order made on Dec. 3, 1949, by the Minister of Town and Country Planning (now the Minister of Housing and Local Government and hereinafter called "the Minister") was dismissed. The question for your Lordships' consideration is whether, on the true interpretation of s. 43 (1) of the Town and Country Planning Act, 1947, and in the circumstances hereinafter described, the Central Land Board validly made

an order, and were validly authorised by the Minister, to acquire compulsorily under that section a plot of land belonging to the appellants, which the appellants intended to lease for building purposes at a rent in excess of what would be commensurate with its existing use value.

The facts are not in dispute. The appellants are the owners of large estates in Ecclesall in the city of Sheffield. They and their predecessors in title have been developing these estates for over thirty years by leasing plots of land for three hundred years on building leases. In August, 1948, a Mr. C. N. Rodgers approached the surveyors to the appellants through his architect, a Mr. A. Lushby, for a long lease of a plot of land at Whirlow Lane, Sheffield, on which to build a house. He was informed that he could have a lease of a plot for a term of three hundred years at an annual rent of £20 10s. and the assignment of the benefit of the appellants' claim in respect of that plot on the sum of £300,000,000 from which payments in respect of the depreciation of land values are to be made under Part VI of the Act of 1947, on condition that he paid any development charge levied under Part VII of the Act. On Aug. 16, 1948, Mr. Rodgers obtained a grant of planning permission under Part III of the Act to build a house on the plot in question, and on Oct. 7, 1948, Mr. Lushby, on behalf of Mr. Rodgers, wrote to the Central Land Board a letter calling their attention to the fact that the appellants did not propose to lease the plot save at a rent which exceeded its existing use value. He requested the board to make a compulsory purchase order or lease for the benefit of his client. As a result of that letter, the secretary of the Central Land Board wrote to the appellants' surveyors, enclosing a pamphlet issued by the board entitled "House 1", and asked whether the appellants were prepared to adopt in regard to the said plot of land one of the three alternative methods (and, if so, which) set out in the pamphlet. The three methods were, briefly: (a) To sell at existing use value, leaving the buyer to pay the development charge. (b) To accept liability to pay the development charge and to sell at a fair price, including that charge. (c) To pay the development charge, build the house, and then sell the house and land at a fair price including that charge. On Nov. 5, 1948, the surveyors to the appellants replied to the Central Land Board stating that the appellants were not disposed to adopt any of the three methods recommended by the board. Thereupon, the Central Land Board wrote to the Sheffield City Council to ascertain whether it was, in the opinion of the council, expedient in the public interest that certain sites, including the plot at Whirlow Lane, should be acquired and made available for housing development, and received a reply from the town clerk to the Sheffield City Council stating that, in the opinion of the council, it was in the public interest that the sites should be made immediately available for housing development. A report from the city engineer was enclosed with this letter. On Dec. 23, 1948, the Central Land Board again wrote to the surveyors to the appellants stating that the approved development of the plot might be hindered, if not prevented, unless it was made available, and that the district valuer had, therefore, been requested urgently to negotiate for the immediate purchase of the plot on the basis of existing use value provided by s. 51 (2) of the Act, which basis the board considered to be the reasonable terms referred to in s. 43 (2) of the Act. At the end of that month heads of agreement were sent to Mr. Rodgers by the appellants. They included the terms which the appellants had previously offered. On Jan. 7, 1949, the district valuer wrote to the surveyors to the appellants asking for certain information to enable him to negotiate for the acquisition of the plot. Meanwhile, negotiations between Mr. Rodgers and the appellants continued, but they finally broke down, whereupon the district valuer repeated his request for information. The surveyors

to the appellants then replied that they recommended a price of £462 for the acquisition. On May 13, 1949, the Central Land Board passed a resolution to the effect that it was desirable to acquire the plot for the purpose of disposing of it for development for which planning permission had been granted on terms inclusive of any development charge payable in respect of the development, and that the plot should be acquired compulsorily since the board were unable to acquire the plot by agreement on reasonable terms. In accordance with this resolution the board purported to make an order on June 22, 1949, authorising them to purchase the plot compulsorily.

On July 20, 1949, the appellants made an objection to the confirmation of the order on the grounds: (i) That the order was ultra vires, in that it had been made to secure an object which was not within the board's powers to achieve, namely, that the appellants should bear the loss resulting from the vesting of development rights in the State by virtue of the Town and Country Planning Act, 1947, and that it should not be permitted to make it a condition of sale that the purchaser should stand in its shoes. (ii) That it was not expedient in the public interest that the board should acquire the plot. (iii) That the terms on which the appellants were prepared to lease the plot were reasonable. As a result of this objection a public local inquiry was conducted at Sheffield by Mr. Fitzgibbon, an inspector of the Ministry of Town and Country Planning, and on Dec. 3, 1949, after his report, the Minister confirmed the compulsory purchase order and recited that he was satisfied that it was expedient in the public interest that the board should acquire the plot and that the board were unable to acquire it by agreement on reasonable terms. On Feb. 10, 1950, by virtue of the provisions of para. 15 (1) of sched. I to the Acquisition of Land (Authorisation Procedure) Act, 1946, the appellants gave notice of motion to challenge the validity of the compulsory purchase and confirmation orders on the grounds (i) that the compulsory purchase order had been made for a collateral purpose, namely, to enforce the policy of the Central Land Board set forth by them in their pamphlet "House 1", and (ii) that the board in making the order and the Minister in confirming it had taken into consideration and been influenced by extraneous matters, namely, the board's policy set forth in pamphlet "House 1", which policy was unlawfully directed to preventing landowners from making it a condition of a sale or long lease of land that the purchaser or lessee should stand in the owner's shoes and accept the risk of not receiving a payment from the £300,000,000 under Part VI of the Town and Country Planning Act, 1947, equivalent to the full development value of the land which value had become vested in the State. On the hearing of the motion BIRKETT, J., gave judgment for the respondents and confirmed the order. An appeal from his decision was dismissed.

As has been stated above, the substantial issue in the case depends on the proper construction of s. 43 (1) of the Town and Country Planning Act, 1947. The section reads as follows:

"(1) The Central Land Board may, with the approval of the Minister, by agreement acquire land for any purpose connected with the performance of their functions under the following provisions of this Act, and in particular may so acquire any land for the purpose of disposing of it for development for which permission has been granted under Part III of this Act on terms inclusive of any development charge payable under those provisions in respect of that development. (2) If the Minister is satisfied that it is expedient in the public interest that the board should acquire any land

for any such purpose as aforesaid, and that the board are unable to acquire the land by agreement on reasonable terms, he may authorise the board to acquire the land compulsorily in accordance with the provisions of this section . . . (4) Any land acquired by the Central Land Board under the provisions of this section shall be disposed of by them in accordance with such directions as may be given to them in that behalf by the Minister, and until the land is so disposed of the board may manage it in accordance with such directions: Provided that nothing in this section shall be construed as authorising the board to carry out any development of land acquired by them thereunder."

Together with this section the resolution of the board of May 13, 1949, must be set out. It is in the following terms:

"That it was desirable to acquire the land in Whirlow Lane, Sheffield (Appendix 'A') for the purpose of disposing of it for development for which planning permission has been granted on terms inclusive of any development charge payable in respect of that development, and that, as the board were unable to acquire the said land by agreement on reasonable terms, an order be made to acquire the land compulsorily."

The board say that their action is taken in exact accordance with the terms of the Act in that they were unable to acquire the land by agreement on reasonable terms and they, therefore, acquired it compulsorily for a purpose connected with the performance of their functions under the following provisions of the Act, and, in particular, for the purpose of disposing of it for development for which permission has been granted. This contention gives rise to two considerations: (i) What is the standard by which "reasonable terms" are to be determined? (ii) Can the board acquire land compulsorily for the purpose of disposing of it simpliciter, or is any limit set to their powers, i.e., is their only right to acquire it where their object is to fulfil one of the functions under the subsequent provisions of the Act, and, if so, what are those functions? The first question is not seriously in dispute. There was evidence in an affidavit by Sir William Fraser on behalf of the respondents that the appellants were not willing to sell their land for less than £462, and that the district valuer, on the basis of Part V of the Act, estimated its value to be about £35. Indeed, the fact that the appellants' terms, whether for letting or sale, always exceeded the existing use value was not disputed by the appellants. A rent of £20 10s., and a liability for development charge, even though a claim on the £300,000,000 fund was assigned, is obviously in excess of the existing use value.

The second question gives rise to more difficulty. In their motion to quash the order and the confirmation of it by the Minister, the appellants contended: (i) that the orders had been made by the board for a collateral purpose, namely, to enforce the policy of the board set out in the pamphlet, "House 1", hereinbefore referred to and to prohibit any other method of dealing with the land; and (ii) that the board and the Minister, in exercising their statutory discretions, had taken into consideration and been influenced by extraneous matters, namely, the policy set forth in "House 1". The honesty of the Minister or of the board was not challenged. They were misguided, it was said, but not consciously unfair. If these contentions are to succeed it must be inferred that the board did not concern themselves with the particular facts of the case, but were minded to carry out a policy which they had adopted whatever the circumstances might be. I see no evidence to this effect. The suggestion is purely speculative and is not borne out by any of the documents produced. But the appellants put their case in another and more persuasive way. The functions of the board,

they say, are financial. The planning authority is the local authority in whose hands are placed the task of determining how development shall be planned. The board's only task is to determine the sums payable as development charges and to collect them: see Parts VI and VII of the Act. The contention has some force, but is not determinative of the case. It would have been possible so to limit the powers of the board that they should have authority only for the direct performance of the function of assessment and collection, but the Act has not done so. It has given them certain collateral powers of which those contained in s. 43 are an example. I should myself be inclined to hold that, even without the specific permission contained in sub-s. (1), the board, under their financial powers, are entitled to acquire land compulsorily in order to enable them to assess and collect the development charge, but I am of opinion that, in case this construction should be subject to any doubt, the fact that they are so entitled is expressly provided by the second half of the sub-section. As I understand his judgment, BRACKETT, J., relied on that half as decisive of the case. In his opinion, it conferred a second and independent power on the board quite irrespective of their other powers and functions. On the other hand, the majority of the Court of Appeal took the view that the second half did not confer a separate power, but was interpretative of the general powers contained in the first half. This view which was expressed by SOMERVELL and SINGLETON, L.J.J., adopts, I think, a correct construction of the wording of the section.

If the view that the function of the board was limited to finance and nothing else were to prevail, it is difficult to see any reason for giving it the compulsory powers contained in s. 43 (4), and, in particular, power to take over land. Jurisdiction to take over land, given, as it is, in direct terms, must be connected with some of the board's functions, and it must, therefore, either be a direct and separate power, or be given to assist in assessing and collecting development charges. It was, indeed, suggested that its object was to enable the board to test the market in order to assist them in determining the proper amount of the development charge or to help them to collect it. Either suggestion is, in my opinion, remote from reality. There must be ample opportunity of calculating value from other sales. In default of other reasons for the power given, the natural explanation is that it was given to enable them to perform their functions as assessors and collectors of the development charge.

It was said, however, that so to decide was contradictory of the provision in s. 64 (2) which makes the right to receive any compensation for loss of development value transmissible by assignment or by operation of law. This provision was, I think, natural in the case of a new charge for which some compensation was to be given. It was desired to make it clear that the compensation was not personal to one who was owner at the appointed day, but was transmissible by or from him. It is, in fact, transmissible in all cases except as part of the consideration given to the purchaser of the land in exchange for an undertaking to pay the development charge. The limitation on transmission imposed by the exception does not conflict with the provisions of the sub-section. It merely ensures that the right to transmit the compensation shall not be used to increase the price charged for the interest assigned to a sum greater than the present use value of that interest. The point is a new one and I do not get any assistance from the cases cited to your Lordships. I would dismiss the appeal with costs.

LORD GODDARD: My Lords, the question which falls for decision in this case in the main depends on the true construction of s. 43 of the Town and Country Planning Act, 1947. In my opinion, that section confers a single

power on the Central Land Board and not two powers. They have power to acquire land for a purpose connected with the performance of their functions, and the words which have been described throughout the argument as the second limb of the section, in my opinion, are no more than a particular instance of that which the legislature regarded as part of the board's functions. It would seem that in this case the board have acted in accordance with the clear words of the statute. The land which they have acquired was land for which permission for development had been granted and they acquired the land for the purpose of disposing of it on terms inclusive of the development charge. They disposed of it to a person to whom permission to develop had been granted, but, although the section does not say that they must dispose of it to such a person, it can, in my opinion, make no difference that that person is also one who has received permission to develop. The appellants' argument, however, is based on the contention that the board has nothing to do with development and that their functions are purely fiscal. The board, on the other hand, contend that this power is given to them for the purpose of facilitating the collection of the development charge. If it is not given to them for that purpose, I have great difficulty in seeing the reason for giving them power to acquire land. I cannot agree that Parliament could have intended to confer this power of compulsory purchase on the board merely for the purpose of enabling them to test the market. That they could use the power for this purpose may be true, though I should think it highly unlikely that they would ever do so, and equally I think it would be most unlikely that Parliament would confer on them or the Minister powers of compulsory purchase merely to achieve such an object. Again, I cannot think that this power was conferred for the purpose of enabling them to realise a security that may have been taken for development charge. It is, I think, of great significance that the only land that they can acquire is land for which permission to develop has been granted. One of the duties of the board is to collect the development charge for the purpose of providing funds for the payment of compensation to landowners who have been obliged to part with the development value to the State. If, therefore, permission has been given by the appropriate authority to develop land which it is in the public interest should be developed and a landowner is unwilling to sell at the existing use value, it follows that the board would be unable to collect the development charge which would otherwise become payable. A would-be purchaser cannot obtain compulsory powers of purchase. It appears to me, therefore, that Parliament intended to give to the Central Land Board, if they obtain the permission of the Minister, the power to acquire the land themselves, so that they may dispose of it at a price which will include the development charge from a purchaser who is willing to carry out the development, and thus to collect the appropriate sum.

A further objection which was taken by the appellants was that by their action the board are preventing the assignment by the landowner of his right to receive the compensation to which he may become entitled. I am unable to agree with this contention. The landowner has, no doubt, the right to participate in the compensation fund, and he can still assign that right as he can assign any other chose in action. The only thing that he cannot do is to assign the right to a purchaser as part of the consideration of the purchase, but for all other purposes his right to assign remains, and, after all, this is a mere temporary provision as the compensation money is to be paid in 1953 after which there will be nothing to assign. But it was said that the real object of the action of the Central Land Board was to enforce a policy whereby all

sales of land would have to take place at existing use values, and it is said that that is going beyond the provisions of the Act, as, if this had been the intention of Parliament, it would have been quite easy to provide in the Act that land should henceforth be sold only at that value. In my opinion, it cannot be said that, though it may well be, as I think, it was the desire of the board that sales should take place at existing use value, this would make the exercise of the power given to them ultra vires.

For the reasons I have expressed above, I think it clear that the action of the board in these or similar circumstances does facilitate the collection of the development charge, and we have here a case in which the landowner was endeavouring to obtain ground rent of an amount in excess of what could have been obtained if existing use value should be the governing consideration. I do not think we need consider whether the intending purchaser might, had the board not intervened, have still been willing to take a lease on the proposed terms. I think it is pretty clear, in fact, that he would not, but I do not find anything in s. 43 which prevents the Central Land Board exercising the express power which is given to them if they and the Minister think it is in the public interest so to do, and, accordingly, I would dismiss the appeal.

LORD OAKSEY: My Lords, I agree. In my opinion, the purpose referred to in the second part of s. 43 (1) of the Town and Country Planning Act, 1947, is a "purpose connected with the performance of their functions" by the Central Land Board within the meaning of the first part of that sub-section. Express power is given to the board by the sub-section to acquire land for the purpose of disposing of it for development for which permission has been granted on terms inclusive of any development charge. It is conceded by the appellants that the functions of the board include the duty to assess and collect development charges, and it appears to me that the power to acquire land for the purpose of disposing of it on terms inclusive of any development charge is clearly a purpose connected with the performance of these functions.

Counsel for the appellants has argued that the advice of the Central Land Board contained in the document headed "House 1", and the correspondence between the board and the appellants' agents, show that the board exercised their powers for the purpose of preventing the appellants obtaining more than the existing use value of the land in question and that there is nothing in the Act to prohibit a sale at such a value. It is true that there is nothing in the Act to prohibit sales at such values, but the express power to acquire land compulsorily for which permission to develop has been granted is inconsistent with a right by the landowner to sell at all in the particular class of cases dealt with. It was further argued on behalf of the appellants that s. 64 (2) of the Act, which provides that the right to receive payment from the sum payable for depreciation of land values shall be transmissible by assignment, was limited by the construction sought to be placed on s. 43 because the landowner could not transmit his right to payment as a term of the agreement to sell the property in respect of which his right to payment arose, but, in my opinion, the right to payment remained transmissible within the meaning of s. 64 (2), and such a limitation is no ground for placing a different interpretation on s. 43. It was also argued that if the development charge could be assessed at less than its full value the landowner would have been forced to sell his land at its existing use value while the purchaser would obtain without paying for it a part of its development value. It may be true that land acquired compulsorily under s. 43 may be disposed of on terms inclusive of a development charge which is less than the full development value, but there is nothing in the Act

to which your Lordships' attention was drawn to show that land cannot be sold at prices higher than its existing use value, and I am unable to see that the discretion, if there is a discretion, which the board have to assess the development charge on less than the full developed value has any bearing on the interpretation of s. 43.

LORD MACDERMOTT: My Lords, this appeal seems to me to present little difficulty once a decision is reached as to the true construction of s. 43 (1) of the Town and Country Planning Act, 1947. This sub-section provides as follows:

"The Central Land Board may, with the approval of the Minister, by agreement acquire land for any purpose connected with the performance of their functions under the following provisions of this Act, and in particular may so acquire any land for the purpose of disposing of it for development for which permission has been granted under Part III of this Act on terms inclusive of any development charge payable under those provisions in respect of that development."

In the course of the argument three views were advanced as to the meaning of this enactment. These, in my opinion, exhaust the relevant possibilities. They may be stated thus: (i) The second limb of the sub-section confers a power separate and distinct from, and wholly independent of, that contained in the first limb, the words "and in particular" which introduce the second limb being used as words of emphasis only and not as indicating an example of the power conferred by the first; (ii) the second limb but particularises something already within the general terms of the first, and, accordingly, the expression "for any purpose connected with the performance of their functions" must be satisfied before power arises under either limb—in other words, the board will have no power of acquisition in a case falling within the language of the second limb if the purpose of the acquisition is not also in fact connected with the performance of their functions under the subsequent provisions of the Act; and (iii) the second limb gives an instance of the power conferred by the first, but in terms which amount to a statutory recognition of the purpose described in the second limb as being within the scope of the first. Accordingly, if the case comes within the wording of the second limb (the word "so" being read as connoting acquisition by agreement and with the approval of the Minister) there is no need, in order to perfect the power it purports to confer, to trace a connection between the purpose therein mentioned and the performance of some function of the board. Of these alternatives view (i) is the most easily discarded. The structure of the sub-section is against it and so, I think, is the ordinary usage of the expression "in particular", though, no doubt, these words are occasionally employed merely to stress or direct attention to what they preface. Moreover, I find it difficult to see why a power to acquire land should be conferred on a statutory body in terms which are not to be related to the performance of its statutory functions, as the acceptance of this view would apparently entail. It seems to me that the proper approach to the second limb must be through the first, and not regardless of it, and, if that is right, view (i) falls out of account and the choice lies between views (ii) and (iii).

This choice I am content to make on what appears to me to be the natural meaning of the wording of s. 43 (1), for I have not found elsewhere in the Act anything to indicate that the language of the sub-section is used otherwise than in its ordinary everyday sense. Reading the enactment in this way I am in favour of view (iii). The word "so" in the expression "and in particular may so acquire" at the beginning of the second limb incorporates the earlier

words of the first limb, "with the approval of the Minister, by agreement . . ." but it is, I think, impossible to go further and say that it also incorporates the expression "for any purpose connected with the performance of their functions." And if that expression is not to be read into the second limb by way of reference I see no good reason for implying it on the strength of the context. It may also be observed that view (ii), unlike view (iii), denies the second limb any practical legislative effect, and, further, that in s. 43 (2) the words "for any such purpose as aforesaid" are, grammatically and naturally, capable of referring to the purpose described in the second limb alone. Both these considerations seem to me to lend support to view (iii) and the definitive character of the second limb which it adopts, but, when all is said, perhaps the best reason for the conclusion I have reached is just that it accords with what this second limb of the sub-section says, namely, that the board "may so"—i.e., by agreement and with ministerial approval—"acquire any land for the purpose of disposing of it for development . . . on terms inclusive of any development charge . . ." If the purpose thus described had no perceptible connection with the performance of the board's statutory functions the position might be different. But, as it is, the purpose of disposing of land ripe for development at a price inclusive of the development charge is, *prima facie*, connected with the board's function of collecting the charge, and I think what the legislature has done in the second limb is simply to preclude the possibility of contention as to whether, in fact, a connection of this sort exists by coupling the power to acquire plainly and directly to the specified purpose. I find nothing strange or irrational in this for it is reasonable enough that a purchaser from the board who pays the development charge as part of the price should not have his title dependent on what may or may not come within a phrase so vague and wide as "any purpose connected with the performance of their functions under the following provisions of this Act".

My Lords, with s. 43 (1) construed in this manner, there is no need to embark on the task of tracing a connection between the acquisition in question and the board's statutory functions. The *bona fides* of the board and the genuineness of their resolution of May 13, 1949, have not been challenged. This resolution states the purpose of the acquisition in terms which echo those of the second limb of s. 43 (1), and there has been no suggestion that in fact such was not the true and immediate purpose of the acquisition. In these circumstances it is, in my opinion, beside the point that, in seeking to acquire land for the purpose thus stated, the members of the board, or some of them, may have been moved by considerations of policy which, in themselves, would not (as I shall assume without deciding) constitute a purpose within the meaning of any part of s. 43 (1). The short answer to all the submissions as to motive is that on the facts here the board have brought their case within the express terms of the second limb of that sub-section. For these reasons I would dismiss the appeal.

LORD TUCKER: My Lords, this case turns on the proper construction of s. 43 (1) of the Town and Country Planning Act, 1947. [His LORDSHIP read the sub-section and continued:] Sub-section (2) goes on to give the Minister power to authorise the board to acquire the land compulsorily in any such case where the board are unable to acquire the land by agreement on reasonable terms if he considers it expedient in the public interest that the board should acquire the land for any such purpose.

Now, it is not in dispute that, in the present case, the compulsory purchase was made with a view to the acquisition of the land by the board for the purpose of disposing of it for development for which permission had been granted at an

inclusive price, a transaction which is plainly within the express language of sub-s. (1). But it is said that the order was *ultra vires* by reason of the words in the sub-section preceding the words "in particular". My Lords, it is, of course, possible that the preceding words might have been so framed as to bring about this somewhat surprising result, but they would have to be very clear before I was persuaded to put such a construction on them. In my view, the true construction of this sub-section is that placed on it by SOMERVELL, L.J., where he says (115 J.P. 317):

"I think that the words should be construed as making it clear that a certain power, as to which there might have been doubt, is to be regarded as one in connection with the functions of the board."

I think it would otherwise have been open to debate whether or not a purchase of this kind was connected with the functions of the board. The language used has, however, in my view, placed the matter beyond dispute, although were it necessary for the decision of the case I should have been prepared to hold that such a purchase was "connected with" two functions of the board, viz., their function of assessing the development charge and their function of collecting it. I think that unrestricted sales on a large scale at prices in excess of existing use value would render more difficult the proper ascertainment of the true existing use value which is a necessary element in calculating the development charge, and that, it being the function of the board to collect the charge to set it against the payments which they will have to make out of the £300,000,000 compensation fund, a policy which tends to facilitate and ensure a speedy payment of the charge by including it in the sale price is a policy the implementing of which is connected with their fiscal functions under the Act. The declared policy of the board to discourage—by compulsory purchase if necessary—sales of land at prices in excess of existing use value seems to me to be one which the Act has empowered them to carry out by conferring on them this power to acquire land for the purpose of disposing of it for development for which permission has been granted at an inclusive price, and it is impossible to say that purchases made for this purpose are *ultra vires*. That the Act might have, but did not, prohibit sales in excess of existing use value, or that the exercise of such powers tends to restrict in some degree the right given by s. 64 (2) to assign a claim on the compensation fund, are matters which afford me no assistance in the construction of s. 43 (1). On this short ground I would dismiss this appeal.

Appeal dismissed.

Solicitors: *Warren, Murton & Co.*, agents for *Newman & Bond*, Barnsley (for the appellants); *Treasury Solicitor* (for the Minister).

G.F.L.B.

DURHAM ASSIZES

(LYNSKEY, J.)

Jan. 30, 31, 1952

REX v. LAWSON

Criminal Law—Fraudulent conversion—Indictment—Charge of conversion of general balance.

The defendant, a solicitor, was charged in each of four counts of an indictment with the fraudulent conversion of a certain sum of money on a day between certain stated dates. The evidence for the prosecution showed that the defendant first paid amounts received by her on behalf of her clients into her clients' account. Later she drew from the clients' account various sums which she paid into her office account, and some of this money was used by her for her own purposes. It was impossible to trace all the moneys so received by the defendant from the office account back to the clients' account and thence to any particular client. The sum charged in each count of the indictment was the sum due from the defendant to a particular client (after giving credit in one count for the sum standing to the credit of the clients' account). On a submission by the defence at the close of the case for the prosecution that there was insufficient evidence to establish the charge in each count and that the indictment was bad since the counts charged the fraudulent conversion of a general balance of account,

HELD: (i) as the evidence for the prosecution enabled a jury to come to the conclusion that on one day between the dates charged in each count of the indictment there had been a fraudulent conversion of some part of the amount charged, there was sufficient evidence to support the counts.

(ii) although in the ordinary case, where it was possible to trace and prove the conversion of individual items of property, it was undesirable to include them all in a count alleging a general deficiency, in a case such as the present, where the individual items could not be traced in detail, the prosecution were entitled to frame their counts in the indictment in the way in which they had been framed.

Re x v. Morris (1933) (24 Cr. App. Rep. 105), doubted and not applied.

TRIAL on indictment.

The defendant, Phyllis Newman Lawson, was charged on an indictment in the first count with fraudulent conversion of property, contrary to the Larceny Act, 1916, s. 20 (1) (iv) (b), in that on a day between Apr. 5, 1950, and July 1, 1951, she fraudulently converted to her own use and benefit the sum of £2,519 6s. 2d. received by her for and on account of Fred Armour. The third and fourth counts were in respect of similar offences, but between different dates and in respect of different amounts received for other clients. The second count charged fraudulent conversion contrary to s. 21 of the Act of 1916, alleging that the defendant, being a trustee of a stated sum of money, converted the same to her own use with intent to defraud. At the close of the case for the prosecution, counsel for the defendant submitted that there was insufficient evidence to establish the charge in each count and also moved to quash the indictment on the ground that it was bad in law, as, on the evidence adduced, the counts charged the fraudulent conversion of a general balance of account.

Veale, Q.C., and Cumming-Bruce for the Crown.

D. B. B. Fenwick and O. Wrightson for the defence.

LYNSKEY, J.: Counsel for the defendant submits (i) that on each count of the indictment, as framed, the evidence adduced by the prosecution is not sufficient to establish the charge contained in that count, and (ii) that all the counts ought to be quashed on the ground that, in view of the evidence adduced, they charge the fraudulent conversion of a general balance of account, and in law such an indictment is bad. The case for the prosecution in answer to the first objection is that on the face of them the counts are regular. The

prosecution say that on the evidence which they have adduced, if the jury accept it, there is ample evidence on which the jury could find the defendant guilty on one or more or all of those counts. The way the prosecution put their argument is that they are alleging here a fraudulent conversion of a sum, not on divers days between Apr. 1, 1950, and July 1, 1951 (to take the first count), but a conversion on a day between those days. They say that the particular date does not matter, and that it is sufficient if the evidence is such as to satisfy a jury that there was a fraudulent conversion on one day between those particular dates. The prosecution say that the evidence which they have adduced clearly shows that there was a conversion between those dates. They further say that they are not called on to prove the conversion of the whole of the amount set out in each count in the indictment, but that it is sufficient, to enable a jury to find a verdict of fraudulent conversion, for them to be satisfied on the evidence that there was a fraudulent conversion of some part of that money on a day between the periods mentioned.

Authorities have been quoted to me to justify that contention, and it seems to me that the argument of the prosecution is correct. In the case of each of the counts they have called evidence to show that the defendant did receive moneys on account of the clients, or (in the case of the second count), of the beneficiaries. They produced both oral evidence and documents which confirmed it. It appears from the defendant's books, which were produced by her cashier, and from the witnesses who have given evidence that the amounts named in the counts in the indictment were, in fact, received by the defendant on behalf of her clients. Further, those books set out details of the expenses or charges or payments properly made against the moneys received, and in each case they show a balance due from the defendant to a particular person or persons on whose behalf the moneys were received. In the case of the first count, the amount actually charged is £2,519 6s. 2d., and that amount is actually shown in the books as being due from the defendant to a Mr. Fred Armour on Aug. 29, 1950. The evidence goes further and shows that, for nine or ten months after that date, Mr. Armour was continually asking for his money, that he was put off with excuses, and, ultimately, in the middle of 1951, the defendant told him that she was in monetary difficulties, but that eventually he would be paid, not only his money, but also the interest he was losing by her failure to pay. On those facts, coupled also with the fact that, after being compelled to go to another firm of solicitors, Mr. Armour has received payment of £1,010, and the balance has never been paid, it seems to me that there is ample evidence to enable the jury, if they accept it, to come to the conclusion that on some day during the period alleged there had been a conversion, and, if they were satisfied of an intention to defraud, a fraudulent conversion, of at least part of that money.

The scheme adopted by the defendant, as outlined in the evidence for the prosecution, was that all moneys received on behalf of clients were paid into her clients' account as the Law Society's regulations require. She also had an office account for the general purposes of her business. The clients' account contained a mixed fund of the moneys of many clients. The defendant paid the amounts which she received on behalf of clients into her clients' account quite regularly. According to the journal kept by her cashier, on or about July 1, 1949, the defendant commenced to draw from the clients' account various sums which ought not to have been drawn, except for the purpose of paying them to the clients and for or on their behalf. These amounts she paid into her office account, and this went on until Jan. 12, 1951. The total amounts which were withdrawn by her from the clients' account and paid into the office account

were, approximately, £4,050 over the whole period. The money so paid into the office account was used, in some cases, regularly, but, apparently, in other cases it was used by the defendant for purposes of her own—purposes for which she had no right to use it.

In those circumstances the prosecution submit that, although it is clear that there was a fraudulent conversion of the whole or part of the sum missing, it is impossible to trace the particular sums converted on any particular day from the office account through the clients' account to the particular account or trust of the client whose money was converted. The prosecution say, therefore, that, having regard to the method adopted by the defendant, they are entitled to take a sum—which happens to be the total sum which was due—and to say on the evidence that the jury must be satisfied that at least part of that sum was fraudulently converted during the period named in the particular count. I have dealt with the first count. The same can be said as to the other counts and to the evidence which supports them. So far as the second count is concerned, according to the entries in the books, on Oct. 19, 1950, there was £493 13s. 9d. due from the defendant to the beneficiaries of the estate of Cyrus William Robinson, deceased. On Feb. 14, 1951, there was £171 3s. 11d. due in respect of the estate of Emily Ann Kell, and, with regard to the final account, the position was that a sum of £400 odd was due in respect of the amounts that ought to have been paid over in respect of the estate of William Chapman, deceased. The prosecution say that a certain sum was standing to the credit of the defendant's clients' account, and that credit has been given to the defendant for that amount and she is only charged in the fourth count with the difference between what remained in the clients' account and what remained unpaid.

In my view, the prosecution have adduced sufficient evidence to support the counts laid in the indictment. My ruling, so far, is subject to the second submission made by counsel for the defendant, viz., that, on the evidence, the amount named in each count was a general balance of account and a count charging fraudulent conversion of such a balance is bad in law. In support of his submission counsel relied on *Rex v. Morris* (1), which came before LORD HEWART, C.J., AVORY, J., and LAWRENCE, J. The headnote to the report reads:

"A count in an indictment should not charge the fraudulent conversion of a general balance alleged to be due."

The case was a curious one. In the first three counts the appellant was charged with embezzling moneys received by him for and on account of his employers, a company. The court found that there was nothing to show that the appellant was the clerk or servant of the company, and, therefore, he could not be convicted of embezzlement. The report of the case is very unsatisfactory and contains little information in regard to the facts and none in regard to the form of the counts in the indictment with which the court was dealing. Delivering the judgment of the court in regard to the fourth count, which is the only part of the judgment material for the purpose of my ruling, LORD HEWART, C.J., said:

"With regard to the fourth count, it is quite obvious that the appellant was charged with the fraudulent conversion of a general balance alleged to be due and that is a course which cannot properly be taken."

No reasons are given for the decision, and, so far as argument is concerned, the only argument adduced for the appellant with regard to the count of fraudulent conversion was:

(1) (1933), 24 Cr. App. Rep. 105.

"With regard to the count for fraudulent conversion, that was framed as alleging the conversion of a general balance alleged to be due."

Unfortunately *Reg. v. Balls* (1) was not cited in *Morris's* case (2), and, so far as one can see, it was not drawn to the attention of the court. In *Balls'* case (1) the prisoner, who was a member of a co-partnership, had to account on each Tuesday for money received in respect of the sale of coal. Each count of the indictment alleged a failure to account each Tuesday for items which the prisoner had received during the previous week in smaller amounts, and the point was taken on behalf of the prisoner that that was wrong, that the counts ought to have been for the individual smaller items received by him during the week and converted to his own use, and, therefore, the count charging the conversion of a balance for that period was bad. The case came before an extremely strong court consisting of COCKBURN, C.J., WILLES, MELLOR and MONTAGUE SMITH, J.J., and CHANNELL, B. Delivering the judgment of the court, COCKBURN, C.J., said:

"It is quite true that if a man receives a number of separate sums and has to account for each of them separately, only three instances of failure to account can be proved under one indictment."

In other words, the court was applying the principle that, if there is a separate liability to account in respect of each item, it would be wrong to include a number of such items in the same count in the indictment. COCKBURN, C.J., went on to say:

"Thus, if there were to be one accounting on Monday, and one on Tuesday, and one on Wednesday, and so on, only three defaults could be charged and proved; though even in such a case, evidence of other instances might be given in order to show that the instances charged were not merely accidental, but that what was done was done intentionally and fraudulently. But here no difficulty of this nature arises. I agree that the prisoner might have been indicted for embezzling any of the separate small sums received by him. But it appears upon the case that his duty was to receive the small sums from time to time; to send in the weekly accounts every Tuesday; and every Tuesday to pay the gross amount received by him during the preceding week into a bank. It is true that each of the small sums received had to be accounted for; but he might well be charged with embezzling the aggregate amount. And evidence of the individual items was admissible to show how this aggregate was made up. It would be very mischievous if, in such cases as these, servants could not be indicted for embezzling the aggregate amounts for which they fail to account. No doubt, in such cases, there is an embezzlement of each of the smaller sums going to make up the total not accounted for; but there is not the less an embezzlement of the whole."

That is a strong judgment and, apparently, covers the case of what, over a short period, would be a general balance of account.

Before *Rex v. Morris* (2), there was another decision, *Rex v. Sheaf* (3), dealing with this matter. AVORY, J., who was a member of the court in *Rex v. Morris* (2), was also a member of the court in *Rex v. Sheaf* (3) and delivered the judgment of the court [the other members of the court being SANKEY and SALTER, J.J.] The question whether the counts were bad in law did not arise for decision because

(1) (1871), 35 J.P. 820; L.R. 1 C.C.R. 328.

(2) (1933), 24 Cr. App. Rep. 105.

(3) (1925), 89 J.P. 207.

the case was dealt with on other grounds and, therefore, what AVORY, J., said on the point was obiter to the decision. He said:

"Reference to the authorities relating to embezzlement, in which it has been made clear that it is not sufficient to charge the embezzlement of a general deficiency unless it appears that by the conduct or course of business it was the duty of the defendant on the date specified to hand over the lump sum which he had received, makes it clear . . . that these two counts in the circumstances of this case were bad in law and ought to have been withdrawn from the jury."

Reg. v. Balls (1) was not cited to the court, but the remarks of AVORY, J., would make it appear that he had that case in mind. The effect of what he said was that it is sufficient to charge a general deficiency if it appears by the conduct of the business in question that the practice is to account for the sums periodically.

In view of the words in the judgment of the court, delivered by AVORY, J., in *Rex v. Sheaf* (2) and having regard also to the decision in *Balls*' case (1), it seems to me that *Rex v. Morris* (3) is in conflict with the earlier decisions. It states the law too widely. There may be cases where it is proper to allege what, in effect, is a general deficiency if one can prove that there was a fraudulent conversion of either the whole or a part of it at one time. In those circumstances, in a case like the present, it seems to me that the prosecution would be undertaking an impossible task to try to trace all the moneys received by the defendant from the office account into the clients' account and thence to the moneys of any particular client or beneficiary. In a case of this kind, if the jury accept the evidence, it seems to me that there is ample material on which they can find that there was a fraudulent conversion of part, at least, of the property named in each count on one date. In my opinion, this is a proper case for the indictment to go forward in this form. I agree that in the ordinary case, where it is possible to trace the individual items and to prove a conversion of individual property and money, it is undesirable that one should include them all in a count alleging a general deficiency. Such a count may be bad for uncertainty, but in a case like this, where the individual items cannot be traced in detail, but where the evidence, if the jury accept it after hearing evidence for the defence, makes it clear that there has been a fraudulent conversion, it seems to me that the prosecution are entitled to frame their counts in the indictment in the way in which they have been framed here. In those circumstances, it seems to me that I must overrule the submission made by counsel for the defendant.

The trial having proceeded the jury found the defendant guilty and she was sentenced to three years' imprisonment.

Solicitors: *Director of Public Prosecutions* (for the Crown); *K. L. Lupton*, Sunderland (for the defence).

G.F.L.B.

(1) (1871), 35 J.P. 820; L.R. 1 C.C.R. 328.

(2) (1925), 89 J.P. 207.

(3) (1933), 24 Cr. App. Rep. 105.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J.)

Feb. 20, 1952

RODGERS v. MINISTRY OF TRANSPORT AND ANOTHER

Highway—Trunk road—Improvement—Widening and levelling—Construction of "lay-by"—Powers of Ministry of Transport—Right of driver to park vehicle on grass verge of highway—Highway Act, 1864 (c. 101), s. 48.

As a result of lorry drivers driving off a trunk road when stopping at a café for refreshment the grass verge was churned up and the footpath was obliterated. The county council, acting on behalf of the Ministry of Transport, in whom the powers and duties of a highway authority in respect of the road were vested under the Trunk Roads Act, 1936, as extended by the Trunk Roads Act, 1946, sched. I, levelled and made good the verge and the space where the footpath had been, curved the footpath so that it no longer crossed the space made good, and constructed something like a "lay-by". The owner of adjoining property brought proceedings to restrain the council and Ministry from providing a parking place.

Held: there was no ground for restraining the construction of the "lay-by", because (i) if, in consequence of the works, the lorry-drivers drove over the verge they would not be doing anything illegal since the verge was part of the highway and they were entitled to drive over it and leave their vehicles on it during a temporary stop for a legitimate purpose such as refreshment; and (ii) the works were not in excess of the statutory powers of the Ministry, since they were "levelling" or "widening" of the road authorised by the Highway Act, 1864, s. 48, and not the construction of a car park.

ACTION for an injunction and a declaration.

The plaintiff was the owner and occupier of a house and land, Marling Manor, near Cobham, Kent, near to the junction of White Hill Lane with the London to Canterbury and Dover Main Road (Watling Street), and abutting on the northern boundary of the London to Canterbury road, a metalled trunk road forty feet wide with grass verges and footpath. Lorry drivers driving along the road constantly stopped for refreshment at Marling Cross Café at the road junction and made a practice of driving off the road on to the grass verge, churning it up and obliterating the footpath. The first defendants, the Ministry of Transport, had all the powers and duties of a highway authority in respect of the trunk road vested in them by virtue of the Local Government Act, 1888, s. 11 (1), the Local Government Act, 1929, s. 29 (1) (2), the Road Traffic Act, 1930, s. 58, and the Trunk Roads Act, 1936, as extended by the Trunk Roads Act, 1946, sched. I. Being unable otherwise to prevent the damage to the grass verge and footpath or to induce the café proprietor to provide a parking ground for customers, the Ministry, acting through the second defendants, the Kent County Council, levelled and made good the grass verge and the space where the footpath had been, and made something like a "lay-by", which could be entered by vehicles at one end and left at the other. They also curved the footpath so that it no longer ran across the space previously ploughed up and made it into a hard path with a kerb to prevent vehicles driving on to it.

The plaintiff asked for an injunction restraining the defendant county council by their servants and agents (i) from providing or constructing a parking place for vehicles on the grass verge opposite the frontage of the plaintiff's land, (ii) from utilising or authorising the use of any part of the verge as a parking place for vehicles, and (iii) from doing any work in respect thereof, and ordering them to reinstate the verge to the state and condition in which it was before July 16, 1951. She also asked for a declaration that the defendant Ministry were not, and never had been, entitled to provide or construct a parking place

for vehicles on the grass verge or to use, or authorise the use of, any part of the verge as a parking place for vehicles.

Elwes, Q.C., and *J. G. S. Hobson* for the plaintiff.

The Solicitor-General (Sir Reginald Manningham-Buller, Q.C.), *J. P. Ashworth* and *R. J. Parker* for the defendants.

LORD GODDARD, C.J.: The first point is whether a lorry driver is doing anything illegal or wrong in driving a vehicle on the grass verge of a highway. He might be doing something which would be punishable under the Highway Acts if he drove on the footpath, but, in my opinion, he is not doing anything wrong if he drives his lorry on the grass verge at the side of the road so as to be out of the way of traffic using the highway. Indeed, that is a proper thing to do because other vehicles will not then have an obstructed road. The right of the public to use the highway is a right to pass and re-pass along it, and they have no right to use it for any other purpose. In *Harrison v. Duke of Rutland* (1) Harrison did not like grouse shooting and he walked up and down the Duke's moors in Derbyshire and kept opening and closing his umbrella to frighten off the grouse. He was held to be using the highway for scaring the birds and not for passing and re-passing. There is no suggestion that the lorry drivers in the present case used the road for any purpose other than for passing and re-passing, though they do stop—and why should they not?—at the café.

The question is whether the Ministry did something illegal in creating this "lay-by". It is said that the Ministry thereby have created a car park, having no power so to do, but "car park" is not a term of art in the law. No doubt, a place has been created where cars will stop, but they have a right to stop. So far as I know, provided he does not drive on the footpath, no one suggests that a driver cannot drive a lorry on the verge of the road which is part of the highway. I cannot assent to the proposition that the Ministry have done anything illegal because they have put the footpath and kerb in such a place that the footpath is now clear of the part of the verge on which the lorries drive. Possibly some of the lorries may get on the verge lower down and in front of the plaintiff's house, but even then they will not be trespassing. They will be on a part of the highway which is the verge.

The relevant enactments seem to me to be perfectly clear. By s. 47 of the Highway Act, 1864:

"A highway board may make such improvements as are hereinafter mentioned in the highways within their jurisdiction, and may . . .",

then follow certain other powers. By s. 48:

"The following works shall be deemed to be improvements of highways:

- (1) The conversion of any road that has not been stoned into a stoned road;
- (2) The widening of any road, the cutting off the corners in any road where land is required to be purchased for that purpose, the levelling roads, the making any new road, and the building or enlarging bridges."

Whether it is looked on as levelling or as widening the road—undoubtedly it is widened—I am certain that what was done here was within the Minister's statutory powers. It is said that the work done invites people to use the space as a parking ground. What can be said is that the county council, acting for the Ministry, have carried out works which will protect the footpath so that it will remain unaffected by the passage of lorries over it, and have strengthened and

(1) [1893] 1 Q.B. 142.

levelled a place where lorries can stand so as not unduly to obstruct the road during the short time drivers require for refreshment. I cannot find that in so doing the Ministry have done anything they had no power to do. I certainly cannot find that the fact that the lorries call at the café for refreshment causes an obstruction of the highway. They do not obstruct the highway merely by a temporary call for a legitimate and proper purpose such as getting a meal while on the road, provided they do not stop in a place where the mere presence of a stationary vehicle would create an obstruction. The Ministry have done their best to abate the trouble of which the plaintiff complains, and if, as she fears, the lorry drivers are not content with pulling up at the place made but drive down the verge in front of her house they will not, in my view, be doing anything illegal, since I cannot subscribe to the idea that a lorry driver may not drive on the verge of the road, which is part of the highway, if he so pleases. The action is misconceived and I give judgment for the defendants with costs.

Judgment for the defendants.

Solicitors: *Waterhouse & Co.*, agents for *W. A. Wyatt*, Gravesend (for the plaintiff); *Treasury Solicitor* (for the defendant).

F.A.A.

PROBATE, DIVORCE AND ADMIRALTY DIVISION

(LORD MERRIMAN, P., AND KARMINSKI, J.)

Feb. 21, 1952

RICHMOND v. RICHMOND

Divorce — Connivance — Adultery by husband — No condonation by wife — Continuance of connivance—"Natural consequence" of wife's connivance—Husband's desertion and wilful neglect to maintain.

In August, 1950, the husband and the wife went on a caravan holiday with Mr. and Mrs. B., the husband then committing adultery with Mrs. B. and the wife with Mr. B., each party knowing of the adultery of the other. Shortly after the return home of the husband and wife, the wife gave up her adulterous association with Mr. B. In June, 1951, Mrs. B. gave birth to a child of which the husband admitted paternity. On Nov. 15, 1951, he left the matrimonial home and went to live with Mrs. B., and since that date he had paid no maintenance to the wife. Justices found the husband guilty of adultery, desertion, and wilful neglect to maintain, and made an order for maintenance in the wife's favour. On appeal by the husband,

HELD: (i) the husband's adultery in August, 1950, had been connived at by the wife; there was no finding by the justices that this adultery had been condoned; and, therefore, her connivance continued in existence and she was not entitled to an order on the ground of the husband's adultery.

Gorst v. Gorst (1951) (115 J.P. 634), distinguished.

(ii) the husband's conduct in leaving the wife and failing to pay her maintenance was not the "natural consequence" of her connivance at his adultery, and, as her own adultery had been connived at by the husband, she was entitled to an order for maintenance on the grounds of desertion and wilful neglect to maintain.

APPEAL by the husband against an order of Southampton borough justices dated Dec. 12, 1951, whereby they directed him to pay maintenance to his wife on the ground of his adultery, desertion and wilful neglect to maintain her.

Willett for the husband.

Brodrick for the wife.

LORD MERRIMAN, P.: This is a husband's appeal from an order for maintenance at the rate of £2 15s. a week made by justices for the borough of Southampton on Dec. 12, 1951, in favour of the wife, on the three grounds of the husband's adultery, desertion and wilful neglect to provide her with reasonable maintenance. The substance of the case is whether any, and if so which, of the findings can stand.

It is common ground that in August, 1950, this husband and wife went with another couple, named Burfitt, for a caravan holiday together with the three daughters of the Burfitts and another child and that in that atmosphere, with those young people about, on at least two occasions, by mutual consent these spouses agreed to an exchange of partners. It is common ground that both pairs of spouses have committed adultery, and, so far, it is as plain a case of connivance on both sides as could well be imagined, and there is no more to be said about that. But it is said that there came a change. The justices have found that, shortly after this holiday period the wife and Burfitt came to the conclusion that they had been very wrong in what they had done, and they refrained from any further intercourse. On the other hand, Mrs. Burfitt had conceived, and, according to the wife, the husband, who was not called before the justices, admitted the paternity of her child, which was born in June, 1951. It is clear that from the middle of November, 1951, they have thrown in their lot together, and, according to the evidence of Mrs. Burfitt, are still living together and committing adultery with each other. The husband left the matrimonial home with which we are concerned on Nov. 15, 1951. He has never returned, and, so far as I can see from the evidence and the findings, he has no intention of returning. It is in respect of that parting and the fact that since that parting he has not been maintaining, or adequately maintaining, his wife that she has brought the charges of desertion and wilful neglect to maintain. The justices held as regards the adultery that, although it is unquestionable that there was mutual connivance in the first instance, in connection with the later adultery as from the time when the husband left the wife (and, of course, strictly speaking, it is the later adultery with which the court was concerned, because it had to be satisfied that adultery was committed within six months of the issue of the summons) the earlier connivance had spent itself within the meaning of the judgment of KARMINSKI, J., in *Gorst v. Gorst* (1). I do not think it necessary to pursue the argument about the finding of adultery on which in part the justices have based their order, because it is clear that the vital point on which counsel for the wife would have been prepared to rely has not been the subject of a specific finding. We do not know what view the justices would have taken about the all-important point whether the original connivance had been got rid of by subsequent condonation.

I propose, therefore, now to deal solely with the findings of desertion and wilful neglect to maintain. I have already said that it is impossible to dispute the finding of the justices that there has been a parting with the intention of breaking up cohabitation finally and against the will of the wife. It is not sought to argue that the wife's original adultery in August and September, 1950, is a bar under s. 6 of the Summary Jurisdiction (Married Women) Act, 1895, to her obtaining an order on the ground of desertion, because that adultery was connived at, even if it has not subsequently been condoned, by the husband. But it is said that it follows from the fact that she connived at her husband's adultery that she is precluded for ever, whatever the circumstances may be, from relying on any matrimonial offence which can possibly be said to flow from the adultery

(1) 115 J.P. 634; [1951] 2 All E.R. 956.

thus connived at. This is said to be an application of the principle that she must be taken to intend the natural consequences of her act in permitting this disgraceful business in August and September, 1950. It is said, of course truly, that it does appear to have been one of the natural consequences that a child was conceived, but whether that is a "natural consequence" within the meaning of the proposition which has been put forward is another thing. It is said that the wife, in conniving at that adultery, must have contemplated that something of the sort would happen, that in any case the husband would get fonder of the other woman than he was of her, and that in the course of time it would necessarily lead to his leaving her for the other woman, and, therefore, that it is impossible for her to complain of desertion because she is really the authoress of her own wrong in that connection. Further, it is said that it is equally impossible for her to complain of wilful neglect to maintain.

I find it impossible to follow that sequence of ideas. The wife did everything that was possible to prevent the disruption of her marriage and to make it clear that she for her part was anxious, or, at any rate, ready and willing, to continue the cohabitation on the basis that what had happened was forgiven and forgotten. On the findings in this case (by which the husband is bound, as he has not given any evidence to contradict them)—that the wife made attempts to get her husband to change his attitude towards her, visited the probation officer for advice, and objected during the time she and her husband were still living together to his even taking Mrs. Burfitt out to a cinema or anything of that sort—it seems to me to be impossible to dispute the conclusion that when he left her on Nov. 15, 1951, it was against her will, and the further conclusion that since that date he has wilfully neglected to provide reasonable maintenance for her. To those findings the justices rightly applied the terms of s. 6 of the Summary Jurisdiction (Married Women) Act, 1895, because, as was admitted, it is impossible to argue that, even if her adultery had not been condoned, it had not clearly been connived at by the husband. In my view, on the facts the justices were fully entitled to find that the husband had deserted the wife and that he had been guilty of wilful neglect to maintain her, and I decline to hold that his conduct in doing these things was a necessary or natural consequence of what happened in August and September, 1950, or that the wife is the authoress of her own wrong. The appeal should be allowed to the extent of varying the order by striking out the ground of adultery, but otherwise the appeal fails.

KARMINSKI, J.: I agree, and only wish to add a very few words for myself on the issue of adultery. The justices applied, perhaps too narrowly, some observations which appeared in *Gorst v. Gorst* (1) to which my Lord has referred, and they failed, in my view, to pay full attention to all the circumstances of the present case in deciding whether or not the wife's connivance of the husband's adultery had spent itself at the time of the adultery complained of. The facts in *Gorst v. Gorst* (1) were peculiar and very different from those in the present case. The petitioning wife in *Gorst v. Gorst* (1) had consented to adultery on the husband's part, though excluding the woman named in the case in the erroneous belief that thereby she might be saving or repairing the marriage which had become precarious. In the present case the wife consented to her husband's adultery with a known woman, while she at the same time consoled herself by committing adultery with that woman's husband. Moreover, there is a difference in the termination of the connivance. In *Gorst v. Gorst* (1) it was found as a fact that the petitioning wife had condoned the adultery of the husband at which

she had connived, though in the erroneous belief that that adultery had then ceased, whereas in fact the husband committed further adultery. As my Lord has pointed out, in the present case the justices have not found as a fact whether or not the wife condoned the husband's past adultery, or whether, indeed, the husband had condoned the wife's. In all the circumstances of the case I have come to the conclusion that the justices were wrong in finding, as they did, that in the circumstances the wife had not connived at the adultery complained of, and I agree entirely that their finding on the issue of adultery cannot be upheld. So far as the findings of desertion and wilful neglect are concerned, I agree with my Lord, and for the reasons given by him, that those findings are unimpeachable, and so I agree that this appeal fails save in so far as the order must be varied by discharging the finding of adultery.

Order accordingly.

Solicitors: *Geoffrey Wells & Woodford*, Southampton (for the husband);
Bernard Chill & Partners, Southampton (for the wife).

G.F.L.B.

CHANCERY DIVISION

(DANCKWERTS, J.)

Mar. 4, 1952

MINISTRY OF HEALTH v. STAFFORD CORPORATION

Hospital—Local authorities owning respectively freehold and leasehold interests in premises—Transfer of property to Minister of Health—Extent of transfer—National Health Service Act, 1946 (9 and 10 Geo. 6, c. 81), s. 6 (2).

The S. corporation, having acquired the fee simple of certain land, erected hospital premises thereon, and from 1907 onwards used the premises as an isolation hospital. By an agreement with the corporation, dated May 27, 1943, the M.S. Joint Hospital Board, constituted under the Public Health Act, 1936, s. 6 (1), acquired a tenancy of the premises for ten years from Oct. 1, 1941, with an option for a further period of ten years. Immediately before the "appointed day" (July 5, 1948) under the National Health Service Act, 1946, the Joint Hospital Board had been using the premises as an isolation hospital. Both the corporation and the joint hospital board came within the definition of "local authority" in s. 79 (1), and the question arose whether both the leasehold interest and the fee simple reversion or only the leasehold interest vested in the Minister of Health under s. 6 (2) of the Act.

HELD: under s. 6 (2) there vested in the Minister a hospital, meaning the site and activities to the extent to which the site or the interests in the site were vested in a local authority immediately before the "appointed day"; the provisions of s. 6 (2) might apply to two or more local authorities as well as to one; and, accordingly, as the premises were being used for the carrying on of the activities of a hospital immediately before the "appointed day", both the leasehold term held by the joint board and the fee simple owned by the corporation were vested in the Minister.

SEMBLE: Aliter so far as the fee simple was concerned if it had been owned by a private person and not by a local authority.

ADJOURNED SUMMONS to determine whether, on the true construction of the National Health Service Act, 1946, certain premises used as an isolation hospital, comprised in an agreement dated May 27, 1943, and made between Stafford Corporation (the owner of the fee simple) and the Mid-Staffordshire Joint Hospital Board, whereby the latter was granted a tenancy of the said premises for a term of ten years from Oct. 1, 1941, with an option for a further ten years,

were, on July 5, 1948, transferred to and vested in the Minister of Health both as to the leasehold interest and the fee simple reversion or only as to the leasehold interest.

Denys B. Buckley for the plaintiff, the Ministry of Health.

Russell, Q.C., and *J. V. Nesbitt* for the Stafford Corporation.

DANCKWERTS, J.: In or about 1880 some land was acquired by the corporation of Stafford which, from 1907 onwards, was used by the corporation for the purposes of what I will call an isolation hospital, i.e., for the accommodation of persons suffering from infectious diseases other than smallpox. It was so used by the corporation down to the formation of a joint hospital board and an agreement of tenancy which was made between the corporation and that board, the Mid-Staffordshire Joint Hospital Board, on May 27, 1943. The origin of that agreement is to be found in the provisions of the Public Health Act, 1936, s. 6 (1) of which provided for the union, by order made by the Minister of Health, of districts for purposes which included the provision of hospitals. The governing body of a united district was a joint board: see s. 6 (2); and it was provided by s. 7 (1) that:

"A local authority having jurisdiction in any part of a united district shall cease to discharge in relation thereto any functions which are functions of the joint board . . ."

That was subject to two provisos the operation of which depended on authorisation by or the approval of the Minister of Health. A provision in s. 6 (4) of the Act compelled a provisional order made by the Minister, if it was opposed, to be confirmed by Parliament. In pursuance of those provisions the Minister made an order which was opposed by the Stafford Corporation and which, therefore, had to be approved by Parliament, it being eventually brought into effect by the Minister under the title of the Ministry of Health Provisional Order Confirmation (Mid-Staffordshire Joint Hospital District) Act, 1938. Pursuant to that, the Mid-Staffordshire Joint Hospital Board came into being, and, after some attempts by the corporation to secure the continuance of their operations notwithstanding the order, finally, on the footing that it would take ten years for the joint board to provide the isolation hospital which was to be built, the agreement of May 27, 1943, was entered into by which the joint board acquired a tenancy for ten years from Oct. 1, 1941, of the property in question, with an option for a further period of ten years after the expiration of that primary term. The result was that immediately before the appointed day operative under the provisions of the National Health Service Act, 1946, this property was being used by the joint board for the purposes of an isolation hospital, the joint board holding the tenancy for the term of ten years from Oct. 1, 1941, with a possible extension for a further ten years, subject to which the fee simple in the property was vested in the corporation.

The question which I have to decide is whether, in addition to the leasehold term which indisputably vested in the Minister under the provisions of the National Health Service Act, 1946, there also vested in the Minister under the Act the fee simple reversion which was retained by the corporation. It is claimed by the Minister that under s. 6 (2) of the National Health Service Act, 1946, the fee simple is vested in him as well as the term of years. Section 6 (1) provides:

"Subject to the provisions of this Act, there shall, on the appointed day, be transferred to and vest in the Minister by virtue of this Act all interests in or attaching to premises forming part of a voluntary hospital or

used for the purposes of a voluntary hospital, and in equipment, furniture or other movable property used in or in connection with such premises, being interests held immediately before the appointed day by the governing body of the hospital or by trustees solely for the purposes of that hospital, and all rights and liabilities to which any such governing body or trustees were entitled or subject immediately before the appointed day, being rights and liabilities acquired or incurred solely for the purposes of managing any such premises or property as aforesaid or otherwise carrying on the business of the hospital or any part thereof, but not including any endowment within the meaning of the next following section or any rights or liabilities transferred under that section."

Referring to the definition section, s. 79 (1), I find that the word "voluntary" is defined as meaning "not carried on for profit and not provided by a local or public authority". I also find that "local authority" means

"the council of a county or county borough, the Common Council of the City of London, the council of a metropolitan borough and the council of a county district,"

which last would apply to Stafford Corporation. The same definition also includes: "(a) any joint board constituted under the Public Health Act, 1936 . . ." or under the other Acts which are mentioned in the definition, so not only Stafford Corporation, but also the Mid-Staffordshire Joint Board, would be included in the definition of a local authority.

With those provisions in mind I turn to s. 6 (2), which is in these terms:

"Subject to the provisions of this Act, there shall also, on the appointed day, be transferred to and vest in the Minister by virtue of this Act all hospitals vested in a local authority immediately before the appointed day, and all property and liabilities held by a local authority, or to which a local authority were subject, immediately before the appointed day, being property and liabilities held or incurred solely for the purposes of those hospitals or any of them or for the purpose of securing accommodation for persons in the area at any hospital not vested in the authority".

The first thing which strikes one on reading that sub-section after having also read sub-s. (1) is that, whereas sub-s. (1) refers to "interests in or attaching to premises", which suggests that the quality of ownership was evidently before the mind of the draftsman when he was dealing with voluntary hospitals, when one comes to sub-s. (2) one finds no reference to interests at all, but a reference to "all hospitals vested in a local authority". It would appear that the draftsman of the Act, when he dealt with hospitals belonging to a local authority, if I may use that term, had in mind simply the corporeal existence of the hospital as a building or an activity which was conducted by or on behalf of the local authority, and it does not appear to have occurred to him that the hospital might not be vested solely in the local authority so far as all interests in land were concerned otherwise than for all time in fee simple. It does not appear to have occurred to him that a local authority might be carrying on a hospital on land in which it had only a very limited interest, such as a short term of years. It appears to have been assumed that nobody other than the local authority would be interested in the land on which the hospital stood, and so, if a certain construction were put on the sub-section, it might result in the appropriation of a citizen's property entirely without compensation. If I look at a hospital merely as a building or activity carried on by a local authority immediately before the appointed day, I might find that there was a short leasehold interest vested in

the local authority and that, subject to that, the site of the hospital belonged in fee simple to some private person. If I then construe the sub-section as simply vesting the hospital without further consideration in the Minister without regard to the interests of other persons in the land concerned, it would appear that the sub-section would have the effect of depriving a private person of his fee simple without any provision for compensation.

I cannot believe that that was the intention of the sub-section, and I conclude, therefore, that some limitation must be put on the apparently all-embracing words "all hospitals vested in a local authority". I think what must be vested in the Minister of Health must be a hospital, meaning the site and activities to the extent to which the site or the interests in the site are vested in a local authority. Accordingly, I find that there is a further question to be considered before I can reach the conclusion in the present case. Two local authorities were concerned. First, there was the Mid-Staffordshire Joint Hospital Board, which had a leasehold term and was actually carrying on the activities of an isolation hospital on the site in question. Secondly, there was Stafford Corporation, which, subject to the rights conferred by the agreement of May 27, 1943, owned the land in fee simple, and was by no means tied to the use of that land for the purposes of a hospital because the land was owned by the corporation as corporate property and, under the provisions of s. 163 of the Local Government Act, 1933, it could be applied by the corporation, subject to the approval of the Minister, to any other purpose for which the local authority were authorised to acquire land. Consequently, it is urged that, if I hold that the fee simple is vested by this sub-section in the Minister of Health, the result is also to deprive without compensation the Stafford Corporation of its property applicable for other purposes than a hospital.

It is a matter which appears to me to be of considerable difficulty. I have taken one step, which is to limit the interests transferred by this sub-section to interests in the land vested in a local authority, and the question is whether I ought to impose a further limitation on the construction of this sub-section. It seems to me that I must apply the sub-section according to the words which are used, and that, if there is any interest in land which is used for the purposes of a hospital immediately before the appointed day, I must regard this sub-section as transferring to the Minister the interests in that land which are vested in any local authority. Therefore, while in some respects the result is rather surprising, I come to the conclusion, invoking the Interpretation Act, that the provisions of this sub-section may apply to two or more local authorities as well as to one. Consequently, it seems to me that, this being land on which the activities of a hospital were carried on immediately before the appointed day, whatever interests in that land were vested in a local authority are transferred by this sub-section to the Minister of Health, and that not only the leasehold term, which was held by the Mid-Staffordshire Joint Board, but also the fee simple interest, which was owned by Stafford Corporation, were vested in the Minister by the provisions of s. 6 (2) of the Act of 1946.

Order accordingly.

Solicitors: *Solicitor, Ministry of Health; Sharpe, Pritchard & Co., agents for T. B. Nowell, town clerk, Stafford (for the defendants).*

R.D.H.O.

CHANCERY DIVISION

(VAISEY, J.)

Mar. 4, 5, 1952

McINTOSH (INSPECTOR OF TAXES) v. MANCHESTER CORPORATION

Income Tax—Industrial building allowance—"Cutting"—Excavation of land by water undertaking—Income Tax Act, 1945 (8 and 9 Geo. 6, c. 32), s. 14 (1) (b), and proviso.

Income tax capital allowances can be claimed under Part I of the Income Tax Act, 1945, on capital expenditure incurred on the construction of industrial buildings and structures. By s. 14 (1) (b) of the Act expenditure incurred on preparing, cutting, tunnelling or levelling any land does not qualify for the allowances, subject to the proviso that expenditure on certain work done to receive the foundations of a building is allowable unless the work consists of cutting or tunnelling.

The corporation owned a waterworks undertaking, and claimed annual wear and tear allowances in respect of expenditure incurred in excavating land for extending reservoirs, deepening channels, making chutes, settling pools, etc. The inspector of taxes disallowed the claim on the ground that the work was "cutting" within the meaning of s. 14 (1) (b) of the Act.

HELD: the word "cutting" was not to be construed in the sense only of making an open way through land, but included any incision of the earth which severed the continuity of the soil, and, therefore, the corporation's expenditure was on "cutting" land within the meaning of s. 14 (1) (b) of the Income Tax Act, 1945, and was properly disallowed from their claim to allowances.

CASE STATED by the Special Commissioners of Income Tax.

The corporation claimed annual allowances under s. 2 of the Income Tax Act, 1945, in respect of capital expenditure incurred on excavation work for the purpose of its water undertaking. The Special Commissioners held that the word "cutting" was to be construed as relating to operations which resulted in "cuttings" in the sense of open ways through land, such as railway cuttings, and that, as the corporation's excavations were not of that nature, the claim should be allowed. The Crown appealed.

The Solicitor-General (Sir Reginald Manningham-Buller, Q.C.), and Sir Reginald Hills for the Crown.

Grant, Q.C., and Tribe for the corporation.

VAISEY, J.: This is a short point arising on the construction of the Income Tax Act, 1945, Part I, which consists of fourteen sections grouped together under the heading of "Industrial Buildings and Structures, etc.". Section 1 provides that where a person incurs capital expenditure on the construction of a building or structure which is to be an industrial building or structure occupied for the purposes of a trade, he shall be entitled to an allowance, referred to as an "initial allowance", equal to one-tenth thereof. Section 2 provides that where a person is entitled to an interest in a building or structure which is an industrial building or structure and that interest is the relevant interest in relation to the capital expenditure incurred on the construction of that building or structure, an allowance, referred to as an "annual allowance", equal to one-fiftieth of that expenditure shall be made to him. Section 8 (1) of the Act defines an industrial building or structure as including a building or structure in use for, among other purposes, the purpose of a water undertaking. Section 14 (1) reads as follows:

"References in this Part of this Act to expenditure incurred on the

construction of a building or structure do not include—(a) any expenditure incurred on the acquisition of, or of rights in or over, any land; or (b) any expenditure incurred on preparing, cutting, tunnelling or levelling any land."

To that sub-section there is a proviso which reads as follows:

" Provided that para. (b) of this sub-section shall not apply to expenditure on work done on the land to be covered by a building or structure for the purposes of preparing the land to receive the foundations of the building or structure, being work which may be expected to be valueless when the building or structure is demolished and not being work which consists of cutting or tunnelling."

The word "cutting", on which the present question turns, is used once in the body of s. 14 (1) and once in the proviso. The question is: What does it mean?

The building or structure, so called, regarding which the question arises is the totality of the extensive works of the taxpayers, Manchester Corporation, as water undertakers in the city of Manchester, such works including their reservoirs at Longdendale, Thirlmere and Haweswater, and the many miles of conduits, aqueducts, pipes, culverts and other apparatus through and by which the water is, or is intended to be, brought to that city. It is admitted that the works of the corporation constitute an industrial building or structure, though one of an unusual type. The only point I have to consider is the meaning of the one word "cutting". Counsel both for the Crown and for the corporation are agreed that the word must have one and the same meaning in the body of the sub-section and in the proviso, but they are, of course, not agreed in their submissions as to what that meaning is.

Counsel for the Crown contends that the cutting meant is a participle of a verb, which means breaking the surface of the land quite generally. Counsel for the corporation submits that "cutting", although he agrees it is a participle of a verb, means making a cutting in the sense in which "cutting" (a noun) is used, somewhat colloquially as I think, in reference to railway cuttings in contrast with tunnels. The Special Commissioners adopted the latter view. They did not accept what is called in the Case the unrestricted definition of "cutting", that is to say, any incision of the earth which severs the continuity of the soil. They accepted the definition of it as making an open way through land which rises above the level of the way to be made through it—a definition which is eminently unsatisfactory in that it raises without attempting to solve the questions how far must the banks of a cutting be before it becomes a cutting?, and when is a trench not a trench but a cutting? I ask these questions, but I think neither I nor anyone else can answer them.

In my judgment, the words "preparing", "cutting", "tunnelling" and "levelling" land are all descriptive of processes applied to land, and do not describe the results or consequences of operating those processes. It is on this short ground that I prefer the unrestricted definition which the commissioners have rejected. The words describe things which are being done and not things which would be produced. Thus "tunnelling" is not, as described there, making a tunnel, and "cutting" is not the same as making a cutting. "Cutting" and "tunnelling" are really, I think, only an extended way of describing excavating, the former being an operation more or less in a downward direction and the latter an operation more or less horizontal. I do not find any inconsistency between the body of s. 14 (1) and the proviso, when it is observed that the proviso deals with what I may call foundation works for which allowances may be made on a special basis and on special terms. I, therefore, come to the conclusion that

this appeal succeeds and that the items of expenditure sought to be disallowed by the tax authorities were properly disallowed. *Appeal allowed.*

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Sharpe, Pritchard & Co.*, agents for *Philip B. Dingle*, town clerk, Manchester (for the corporation).

C.N.B.

HOUSE OF LORDS

(LORD NORMAND, LORD REID, LORD TUCKER, LORD ASQUITH OF BISHOPSTONE and LORD COHEN)

Jan. 15, 16, Mar. 6, 1952

PARVIN v. MORTON MACHINE CO., LTD.

Factory—Dangerous machinery—Duty to fence machinery—Machinery manufactured in factory—Factories Act, 1937 (1 Edw. 8 and 1 Geo. 6, c. 67), s. 14 (1), s. 16, s. 20.

The respondents were the owners of a factory engaged in the manufacture of machinery. The appellant, who was under eighteen years of age, was employed by the respondents in the factory as an apprentice fitter. While cleaning a dangerous, but unfenced, part of a machine which had been manufactured in the factory, he was injured. He claimed damages for the breach by the respondents of their statutory duty under s. 14 (1), s. 16, and s. 20 of the Factories Act, 1937.

HELD: on the true construction of s. 14 (1), read in conjunction with s. 12 and s. 13 of that Act, the words "any machinery" did not apply to machines within the factory which were products of the manufacturing processes carried on in the factory, and, therefore, the duty securely to fence dangerous machinery laid on occupiers of factories by s. 14 (1) and s. 16 and the prohibition against young persons cleaning dangerous machinery contained in s. 20 did not apply, and the respondents were not liable to the appellant under those sections.

APPEAL by a workman from an order of the Second Division of the Court of Session (LORD THOMSON (Lord Justice-Clerk), LORD JAMIESON and LORD PATRICK), dated June 23, 1950, affirming an order of the Lord Ordinary (LORD STRACHAN), dated Jan. 5, 1950, whereby he held that the respondents were not liable to the workman (their employee) for breach of s. 14 (1), s. 16, and s. 20 of the Factories Act, 1937, when the appellant was injured while cleaning a machine which had been produced in the factory for sale. The respondents' contentions that the sections were intended to apply only to machinery in use in the factory, and not to manufactured products of the factory, were upheld by both courts.

Beney, Q.C., and *J. G. Wilson* (of the Scottish Bar) for the appellant.

Calver, Q.C., and *Sloan* (both of the Scottish Bar) for the respondents.

The House took time for consideration.

Mar. 6. The following opinions were delivered.

LORD NORMAND: My Lords, the appeal submits for decision a novel question on the construction of the Factories Act, 1937. It is whether the provisions of s. 14 (1), s. 16 and s. 20 of the Act apply to machines or machinery manufactured in the factory or only to machines or machinery for use in the factory in the processes of manufacture or as ancillaries to these processes. There is no reported case in which this question has been decided. The same question might have arisen under the Factory and Workshop Act, 1901, and,

though it is not necessary to decide the point, I see no reason to differ from the opinion of LORD PATRICK that there is no difference material to this question between the language of the Act of 1901 and the language of the Act of 1937.

The facts as averred are simple. The appellant, a minor employed by the respondents as an apprentice fitter, was instructed by one of the journeymen fitters to clean a dough-brake which had been manufactured and assembled in the respondents' factory. The dough-brake consists of a flat table six feet long and twenty-two inches wide divided into two equal parts by a pair of rollers each of them twenty-two inches wide. One roller is placed with its upper surface flush with the table surface, and the other is mounted directly above it at a height which can be adjusted according to the required thickness of the dough which is passed between the rollers while they are revolving. The rollers are driven at a speed of forty revolutions a minute by an electric motor built in under the table. A guard is provided which is so designed that it can come down on the side of the rollers where the nip-in may happen to be according to the direction of the rotation of the rollers. Before the appellant began to clean the dough-brake the fitter had removed the guard in order to adjust it and had set the brake in motion. While the appellant was working, a rag held by him was drawn between the rollers and after it his hand and forearm. He sues both on negligence at common law and on breach of the duties imposed by s. 14 (1), s. 16 and s. 20 of the Act. His averments of negligence were held to be relevant by the Lord Ordinary and issues have been approved. The respondents did not reclaim against that part of the Lord Ordinary's interlocutor. On the other hand, the Lord Ordinary held the averments of breach of statutory duty irrelevant, and he, therefore, repelled the appellant's plea-in-law directed to them and sustained quoad them the respondents' plea to relevance. The appellant reclaimed against this part of the interlocutor and the Second Division of the Court of Session unanimously refused the reclaiming motion and adhered.

My Lords, I agree with the learned judges in the courts below that s. 14 (1), s. 16 and s. 20 of the Factories Act, 1937, do not apply to machines within the factory which are the products of the manufacturing processes carried on in the factory. Section 14 (1) provides:

"Every dangerous part of any machinery, other than prime movers and transmission machinery, shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced: Provided that, in so far as the safety of a dangerous part of any machinery cannot by reason of the nature of the operation be secured by means of a fixed guard, the requirements of this sub-section shall be deemed to have been complied with if a device is provided which automatically prevents the operator from coming into contact with that part."

If the sub-section applies to the dough-brake, it must follow that s. 16, which deals with the construction and maintenance of the guard required by s. 14 (1), will apply. So, also, will s. 20, which provides:

"A woman or young person shall not clean any part of a prime mover or of any transmission machinery while the prime mover or transmission machinery is in motion, and shall not clean any part of any machine if the cleaning thereof would expose the woman or young person to risk of injury from any moving part either of that machine or of any adjacent machinery."

For the purposes of this case the parties were agreed that "machine" and "machinery" could be regarded as interchangeable terms. For the appellant it is contended not only that "any machinery" in s. 14 (1) and likewise "any machine" in s. 20 are words capable of applying to the dough-brake, but that in their ordinary literal meaning they do so apply. It would be difficult to dispute this contention in the abstract. But the context must be looked at and I find in the context supplied by s. 12 and s. 13 compelling reasons for construing the word "machinery" in s. 14 (1) as denoting only machinery used for production. It is necessary to notice the inter-relation of the three sections. Section 12 deals with prime movers, s. 13 with transmission machinery, and s. 14 (1) with "any machinery, other than prime movers and transmission machinery". If it can be shown that the prime movers and the transmission machinery are prime movers and transmission machinery used as part of the factory equipment for its manufacturing processes, it is a logical inference that "any machinery other than prime movers and transmission machinery" means any other machinery used in the factory for or ancillary to its manufacturing processes. Now s. 12 (1) deals with flywheels directly connected with prime movers and with every part of any prime mover not excepted by sub-s. (3) "whether the flywheel or prime mover is situated in an engine-house or not". It is apparent from these words that the sub-section applies to a flywheel or prime mover which may be in the factory engine-house and, therefore, part of the factory equipment. Sub-section (2) deals with the head and tail race of every water-wheel and of every water-turbine, and these must necessarily be part of the factory plant. Sub-section (3) excepts from the operation of sub-s. (1) electric generators, motors and rotary converters if they are in such a position or of such a construction as to be as safe to every person employed or working on the premises as they would be if securely fenced. The implication of sub-s. (3) is that the machinery excepted may have a permanent position in the factory which in itself secures safety. This sub-section also appears to be concerned only with machinery which is part of the factory equipment. Section 13 is throughout dealing with "the transmission machinery". The use of the definite article is unintelligible unless the transmission machinery is the transmission machinery used in the factory for its processes of manufacture. LORD PATRICK's judgment puts the argument in a clear light when he says that s. 12 and s. 13 obviously are concerned with plant used in manufacture and that s. 14 then naturally follows, to include the rest of the machinery used in the process of production.

These considerations conclude the case against the appellant. For s. 16 can apply only if s. 14 (1) applies, and in s. 20 the division—prime movers, transmission machinery and any machine—corresponds to and repeats the division of machinery in ss. 12 to 14. It appears to me that there is no ambiguity or difficulty in construing the sections founded on by the appellant and that it is quite unnecessary to have recourse to presumptions or maxims which may be an aid to construction when there is ambiguity or doubt. I, therefore, propose to say nothing about the judicial observations cited to us on the proper approach to the construction of ambiguous phraseology in remedial statutes or in penal statutes. Nor do I find it necessary to rely on certain other sections in the Act which are referred to in the judgments of the courts below or which were referred to in the argument. It is true that other sections in the Act are by their terms restricted to premises, plant or equipment of the factory, yet, it might be said, if that were all, there would be no necessary inconsistency in giving to the words "any machinery" in s. 14 (1) their literal

and natural meaning and applying them to machinery within the factory which was the product of the factory. But I cannot find that any of the provisions of Part II of the Act apply to any machinery except machinery which is part of the factory and used in the manufacturing processes, and I think that none of them applies to machines made in the factory. I would dismiss the appeal with costs.

LORD REID: My Lords, in this case your Lordships are only concerned with the alleged breach of statutory duty by the respondents. The case for the appellant can be thus stated shortly:—Section 14 (1) of the Factories Act, 1937, requires that every dangerous part of “any machinery, other than prime movers and transmission machinery”, shall be securely fenced except in circumstances which did not exist in this case. The appellant, while in the respondents’ employment and doing work in the respondents’ factory which he had been instructed to do, was injured by a dangerous, but unfenced, part of a machine which was in the factory, and that dangerous part was neither a prime mover nor transmission machinery. The respondents’ answer can be stated equally shortly. They manufacture machinery in their factory and this machine had been manufactured by them for sale and was not part of the equipment of their factory. They contend that s. 14 (1) only applies to machinery which is part of the equipment of a factory.

A number of arguments on both sides were based on inferences to be drawn from other parts of the Act and on general canons of construction. I do not think that these considerations afford much assistance in this case. The scope of s. 14 (1) must be determined by examining its terms and particularly the first part of it

“Every dangerous part of any machinery, other than prime movers and transmission machinery . . .”

The reason why prime movers and transmission machinery are excepted is plainly because these kinds of machinery are dealt with by s. 12 and s. 13 respectively. If one looks at the terms of s. 13 one can hardly doubt that the scope of that section is limited to transmission machinery which is part of the equipment of the factory and the terms of s. 12 strongly suggest a similar limitation of its scope. If the appellant is right, Parliament has not provided any statutory protection where a prime mover or transmission machinery is present in a factory but is not part of its equipment, but it has provided statutory protection when other machinery is so present in a factory. In other words, the word “machinery” where it first occurs in s. 14 (1) has a different scope from that which it has where it next occurs—in the first case “any machinery” includes machinery which is not part of the factory equipment; in the second case “machinery” in the phrase “transmission machinery” does not. I can find nothing in the context to justify this difference. Section 12, s. 13 and s. 14 must be read together, and I think that, in the absence of any indication of a contrary intention, their scope must be held to be similarly limited.

I have had an opportunity of reading the speech which my noble and learned friend, LORD NORMAND, has just delivered and I agree with it. In my opinion, this appeal should be dismissed.

LORD TUCKER: My Lords, I agree.

LORD ASQUITH OF BISHOPSTONE: My Lords, I agree with the opinions expressed by my noble and learned friends. The case turns substantially on the construction of the words “any machinery” in the first line of

s. 14 (1) of the Act of 1937. Construed quite literally, these words would, no doubt, include almost anything, for instance, a bicycle or motor car casually left on any premises. But the Act applies only to factories (s. 149). A "factory" connotes a place in which things are made, and by the definition in s. 151 of the present Act it includes a place where they are "repaired", "adapted for sale", and the like. When in such a statute "machinery" of, or in, such a factory is spoken of, *prima facie* the expression surely relates to the machinery by which the things in question are made, repaired, or adapted for sale, and not to the things themselves, even if those things themselves consist also of machinery. The assumption that such a limitation is intended is, in my view, strongly reinforced by the collocation—the architecture, if that expression may be allowed—of s. 12, s. 13 and s. 14. Section 14 (1) makes provision for the precautions to be taken in relation to "any machinery" other than "prime movers and transmission machinery". Going back, we find that s. 13 has already made provision for the precautions to be taken in relation to "the transmission machinery". Not "transmission machinery" but "the transmission machinery". The definite article clearly limits this expression to transmission machinery used as factory plant, and prevents it from extending to transmission machinery (if any) produced by the factory plant. In my view, a similar limitation, though not express, must be read into s. 12, which deals with precautions in relation to "prime movers". It would be a very capricious statute which, in the case of a factory which both used and produced prime movers and both used and produced transmission machinery, provided by one of its sections—s. 12—that certain protection should be afforded to the worker both in regard to the used and produced prime movers, whereas by another—s. 13—it provided that he should enjoy corresponding protection only in regard to the used, and not in regard to the produced, transmission gear. If this is so, when s. 14 (1) makes provision in regard to "any machinery, other than prime movers and transmission machinery", the exception carved out of "any machinery" consists entirely of plant, and it seems right to read the whole from which the exception is carved out as also limited to machinery used as plant. The structure of s. 12, s. 13 and s. 14, to my mind, implies that their operation is wholly within the framework or ambit of machinery used as a productive agent, and does not extend to machinery emerging as a product. For these short reasons I respectfully concur with the conclusion at which my Lords have arrived and, like them, would dismiss the appeal.

LORD COHEN: My Lords, I agree.

Appeal dismissed.

Solicitors: W. H. Thompson, agent for Digby Brown & Co., Glasgow, and D. G. M'Gregor, Edinburgh (for the appellant); Martin & Co., agents for Biggart, Lumsden & Co., Glasgow, and Morton, Smart, Macdonald & Prosser, Edinburgh (for the respondents).

G.F.L.B.

COURT OF CRIMINAL APPEAL

(LORD GODDARD, C.J., ORMEROD AND PARKER, JJ.)

Mar. 17, 1952

REG. v. MORAN

Criminal Law—Demanding money with menaces—Attempt—Larceny Act, 1916 (6 and 7 Geo. 5, c. 50), s. 30.

The appellant was indicted for demanding money with menaces, contrary to s. 30 of the Larceny Act, 1916. It was proved that he met one F. in the street and offered to show him his way, and then said to F.: "I want some money, and, if not, you've had it," but when F. squared up to him, the appellant went away and made no attempt to follow him. The judge directed the jury that on the evidence it would be possible for them, if they thought proper, to convict the appellant of an attempt to demand money with menaces. The jury found the appellant guilty of attempted robbery.

HELD, that, in view of the direction of the judge, the verdict should be treated as one of attempting to demand money with menaces, but that no such offence existed in law as there must have been either a demand or not; in view of the direction and the verdict, the court could not exercise its powers under s. 5 (2) of the Criminal Appeal Act, 1907, of substituting a verdict of guilty of another offence; and, therefore, the conviction must be quashed.

APPEAL against conviction.

The appellant was indicted at Suffolk Assizes before CROOM-JOHNSON, J., for demanding money with menaces. The learned judge having directed the jury that they could, if they thought proper, convict of an attempt only, they brought in a verdict of Guilty of attempted robbery. The appellant was sentenced to six months' imprisonment.

Havers for the appellant.

Jellinek for the Crown.

LORD GODDARD, C.J., delivering the judgment of the court, said that, in view of the direction of the learned judge, the verdict of the jury amounted to a conviction of an attempt to demand money with menaces. In the opinion of the court it was not possible to find such a verdict. A man might form the intention of demanding money with menaces and then not put his intention into practice. In such a case he would not be guilty of demanding, but, also, he could not be convicted of an attempt to demand.

Conviction quashed.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *Gotelee & Goldsmith, Ipswich* (for the Crown).

T.R.F.B.

CHELMSFORD ASSIZES

(CROOM-JOHNSON, J.)

Feb. 28, 1952

HUNWICK v. ESSEX RIVERS CATCHMENT BOARD

Negligence—Sea wall—Duty of catchment board to repair—Footpath on wall—Collapse of wall—Injury to person on path.

Under the Land Drainage Act, 1930, s. 4 (1) (a), and the Essex Rivers Catchment Board Transfer Order, 1932, the defendant catchment board were the authority responsible for the repair of an ancient sea wall on the coast of Essex. As a result of people walking along the top of the wall, a footpath had come into existence over forty-three years ago and was used by the public. In July, 1948, part of the wall collapsed while the plaintiff was standing on it and she was injured. In an action against the board for damages for negligence,

HELD: (i) the duty of the board, as the successors in title of the commissioners of sewers, was to keep the sea wall in repair, but they were not in occupation of the wall as a result of that duty and they were not empowered to maintain, construct or dedicate a highway on the wall, and, therefore, assuming that there was an ancient highway along the top of the wall over which the public had the right to pass, there was no duty on the board to keep it in repair and they were not liable to the plaintiff for failure to do so.

(ii) the duty of the board was to repair the sea wall so as to restrain the sea water and they were under no duty to repair it so as to prevent persons going on it from being injured; the plaintiff was not on the sea wall at the invitation of the board; and, therefore, they owed no duty to protect her from, or warn her of, a hidden danger and were not liable to her in damages.

ACTION for damages for personal injuries.

In July, 1948, the plaintiff was walking along the top of a sea wall on the coast of Essex, and, while she was standing to let some other people pass, part of the wall collapsed and she was injured. In an action against the Essex Rivers Catchment Board, who were the authority responsible for the repair of the wall, she contended *inter alia* (a) that there was a public footpath along the sea wall, that the board were the owners or occupiers of the wall, and, alternatively, that, under the Land Drainage Act, 1930, s. 4, and the Essex Rivers Catchment Board Transfer Order, 1932, the rights, obligations and liabilities over and in connection with the sea wall and the footpath were vested in and to be discharged by the board, and, therefore, they were under a duty to keep the footpath and the sea wall in a proper state of repair and were liable to her in damages for breach of that duty, and (b) that the board had failed to protect her from or warn her of a hidden danger on the sea wall.

J. M. Shaw for the plaintiff.

Jukes and P. M. O'Connor for the catchment board.

CROOM-JOHNSON, J.: On the coast of Essex, in the neighbourhood of St. Osyth, an ancient sea wall (the age of which was not proved by either party) was erected either by the Crown direct or by the Commissioners of Sewers in whom for a long time were vested the powers of the Crown to create and keep in order sea walls so as to prevent the incursion of the sea into the land behind the wall. On the top of this sea wall, which is constructed of clay with a slope towards the sea, is a pathway, which has been there for over forty-three years. It is in no sense made a pathway; it came into existence as a result of people climbing up the sea side of the wall and walking on the top of it. [His LORDSHIP stated the facts in regard to the plaintiff's accident, and continued:] The question that arises is: Is the plaintiff, in the circumstances of the case, entitled to maintain an action against the particular defendants against whom she has elected to proceed? That has given rise to a number of problems

posed for me by counsel for the plaintiff with a view to suggesting various pegs on which this claim can be hung, and, accordingly, it is necessary that I should examine what the position is and has been in regard to the sea wall.

The circumstances in regard to the wall, so far as is known, have already been examined by the Court of Appeal in *Symes & Jaywick Associated Properties, Ltd. v. Essex Rivers Catchment Board* (1). To save expense, counsel has directed my attention to certain statements made in the judgments in that case, and no objection has been taken to that method of procedure. This sea wall is part of a length of sea wall which is under the care of the defendants. It forms three sides of a parallelogram. In the space between it and the top of the beach, as it now exists at the material point, a number of dwellings have been erected in a series of straight paths or roads, and the district has now become a populous one. To protect the dwellings, those responsible for them made a path or road-way, known as "Brooklands", on the top of the shingle or beach. But, apparently, Brooklands is not likely to be an efficient substitute for the sea wall except in a temporary way. No one knows when the wall was constructed, but it must be very old. There is no doubt that at common law it was the duty and the prerogative of the Crown to protect the realm against the incursion of sea water, just as a wall of a fort is erected to prevent the attack of an enemy: see per GREER, L.J., in *Symes'* case (1). The Commissioners of Sewers began to exercise jurisdiction in respect of land drainage under the Statute of Sewers, 1531 (23 Hen. 8, c. 5), but I do not think I need examine whether they took over the protection of the sea walls so constructed. It is quite plain that what was done was done to protect the land, to guard against the invasion of the sea as a destructive force, and to conserve the use of the properties inland. In *A.-G. of Southern Nigeria v. John Holt & Co. (Liverpool) Ltd.* (2) LORD SHAW OF DUNFERMLINE, delivering the judgment of the Privy Council, said:

"... it is recognised by law that it is the duty of the Crown to protect land from the incursions of the sea, and if, in the circumstances of the present case, a licence had been granted and duly recorded to the respondents to reclaim as was done, that licence would have been in entire accord not only with the right of the subject but with this duty of the Crown."

It seems to me, therefore, that the true position is that anything which interferes with the duty of the Crown or of the commissioners who took over the duty of protection, can and must be prevented. It is established in other cases that there cannot be permitted to exist a state of affairs where persons have the right to keep a sea wall in repair, but no precise obligation to do so.

This principle becomes important in view of one of the claims made in this action. It is said that a path was constructed at the top of the wall with the intention of dedicating it as a highway, and that thereby the path has become a highway. There is no question that a footpath may be a highway, and no difficulty, therefore, arises from that point of view. But, on the other hand, if people who have a duty to maintain drainage or other works for public utility proceed to do something which makes the carrying out of their duties impossible, then the ordinary results do not follow. The whole question on this point was examined in *Rez v. Inhabitants of Leake* (3). The question in that case was whether trustees, in whom land was vested, by statute, for certain public purposes, were supposed to have dedicated the surface of some part of the land for use as a highway. DENMAN, C.J., and PARKE, J., held that, if the land were vested by the Act

(1) 101 J.P. 179; [1936] 3 All E.R. 908; [1937] 1 K.B. 548.

(2) [1915] A.C. 599.

(3) (1833), 5 B. & Ad. 469.

in the trustees so that they were thereby bound to use it for some special purpose incompatible with its public use as a highway, the trustees would have been incapable, in point of law, of making a dedication of it, but that, if the use by the public was not incompatible with the objects prescribed by the Act, they would have had the power. PARKE, J., said:

"The mere circumstance of their not being beneficial owners, cannot preclude them from giving the public this right."

In the case now before me, I think it is quite plain that the footpath on the top of the sea wall has been used by the public for generations, and, if so, the circumstance that that user has continued, apparently without objection or any inconvenience or interference with the duty to maintain the sea wall, makes me think that the use by the public of the footpath is not incompatible with what was prescribed by the law on whomever the duty was to maintain the sea wall. Therefore, I have come to the conclusion that it was possible for someone to dedicate the pathway as a highway. Whether the Crown could do it, I doubt very much, as that might have involved the question how far mere user can affect the property of the Crown and interfere with the prerogative. For the purpose of this judgment, however, I propose to assume that the path on the top of the sea wall is an ancient highway which was, at some time or another, dedicated for use of the public, and, accordingly, that the public had a right to pass along the path in the way that the plaintiff was doing on the day when she met with her accident. The trouble about that branch of the case is that, if the path is an ancient highway, it is repairable by the inhabitants at large, and, unless that duty has been specifically cast on some other person by legislation or by the proper construction of such legislation as there may be, the duty still persists in the inhabitants at large or in the inhabitants of the parish where the highway is situate. Therefore, unless the plaintiff can establish that the duty of maintaining this ancient highway was cast on the defendant board or their predecessors in title, they are not liable to maintain it. Moreover, even if they were liable, they would be liable only for acts of misfeasance, and not for acts of non-feasance. In *Rex v. Inhabitants of Leake* (1) it was laid down that the inhabitants of a parish are bound by law to repair all roads within it dedicated to and used by the public, although there be no adoption of such roads by the parish. If that is the right approach to this part of the argument, the only question which could then arise would be: Has the duty of maintaining this highway been cast on the defendants? There is no evidence that there was ever a dedication either by the defendants or by any of their predecessors in title within modern times—I do not think I need go further back than the Sewers Act, 1833—and I do not think that it is the fact.

By the Sewers Act, 1833, s. 47:

"The property of and in all lands . . . erections, works, and other things which shall have been or shall hereafter be . . . obtained, erected, constructed, and made by or by the order of, or which are or shall be within or under the view, cognisance, or management of any commissioners of sewers . . . shall be and the same are hereby vested in . . ."

the Commissioners of Sewers. Under the Land Drainage Act, 1930, s. 4, and the Essex Rivers Catchment Board Transfer Order, 1932 (S.R. & O., 1932, No. 875), made under s. 4 (1) (a) of the Act of 1930, the powers and duties of the commissioners for the area in question were transferred to the defendant board, and it is contended that, in consequence, s. 47 of the Act of 1833 imposes on the board a liability to maintain the highway on the sea wall. It must be

(1) (1833), 5 B. & Ad. 469.

borne in mind, however, that the duty cast on the commissioners [by the Statute of Sewers, 1531, s. 1,] was to keep the sea walls in repair, and I can find no reference in any of the statutes to which I have been referred to any liability or power on their part to maintain, construct or dedicate a highway. I do not think that they were at any time in the position of being proprietors of land which they could dedicate, other than land which they had purchased. I am not satisfied that, for the purpose of this action, the catchment board, or any of their predecessors in title, were ever in occupation of the sea wall, and it is not one of those classes of cases in which a duty is cast on the individual or on a board in such a manner that, if the duty is discharged negligently, an action might lie for breach of that duty.

The argument of counsel for the plaintiff that with the duty to look after the bank arose the vesting of the bank itself as a right of property in the commissioners would, if correct, have some rather extraordinary results, as not only would the property be vested in the defendant board or their predecessors, but the real owner would be divested of it. It seems to me that the answer to this contention is that, if this is a highway, the people who are responsible for its repair, and the only people against whom an action could, in any event, be brought with regard to this particular part of the highway, are the persons or the authority in whom the duty of maintaining the highways in this particular locality is now vested. I think I have said enough to show that, unless there is some statutory provision in the Act of 1930 or in the order of 1932 which imposes that particular duty on the defendant board, not with regard to the bank but with regard to the highway, the plaintiff cannot succeed on this point.

Her claim is then put in a slightly different way. It is said, in effect, that she had a right, as against the catchment board, to have care taken so that she was not subjected to any hidden danger of which she had not been warned, and that there was a duty on the board either to protect her from the danger or to warn her of it. There seems to be a variety of answers to that. The plaintiff was not there at the invitation of the catchment board. The board never accepted responsibility for this footpath worn by the feet of passengers during the years—that is the only way in which it came to be a footpath—and they neither invited people there, nor did they wish people to be there. They did not endeavour to keep people off the sea wall, but, in the circumstances, it would have been impossible for them to attempt to do so. They were not in occupation, they were not the owners, and, furthermore, there is no evidence that anybody on behalf of the board knew, or should have known, of this particular danger. I am quite satisfied that the board do what they can to keep the sea wall in repair, not for the purpose of seeing that foot passengers, who happen to clamber on it, are not injured, but for the purpose of keeping out the sea water. It is their duty to protect the sea wall and to keep it in repair, and I have heard nothing in the course of this case which suggests that they are failing to do it. I can see no ground, therefore, for saying that they ought to have known that this place was likely to collapse. I am quite satisfied that, whatever caused the plaintiff's accident, it was due to no negligence on the part of the board or of their servants. I think that the attempt to suggest that this is a case of a hidden trap or danger, based on *Indermaur v. Dames* (1) and similar authorities, is quite hopeless on the facts. I have come to the conclusion that the action fails, and must be dismissed with costs.

Judgment for the defendant board.

Solicitors: *Leonard Tubbs & Co.* (for the plaintiff); *Hair & Co.* (for the catchment board). G.F.L.B.

(1) (1867), 31 J.P. 390; L.R. 2 C.P. 311.

COURT OF APPEAL

(SOMERVELL, DENNING AND ROMER, L.JJ.)

Mar. 12, 13, 1952

EVERETT v. RIBBANDS AND ANOTHER

Malicious Prosecution—Plaintiff bound over by court of summary jurisdiction—Competency of action—Summary Jurisdiction Act, 1879 (42 and 43 Vict., c. 49), s. 25.

On the hearing of an information laid by a police officer at the instance of a third person the plaintiff was ordered by the magistrate to enter into a recognizance and to find two sureties to keep the peace and be of good behaviour for twelve months or in default to serve one month's imprisonment. In an action by the plaintiff against the police officer and the third person for damages for malicious prosecution,

HELD: in view of the provisions of s. 25 of the Summary Jurisdiction Act, 1879, the proceedings before the magistrate could have been determined in favour of the plaintiff; they were not so determined; and, therefore, no action for malicious prosecution lay.

Steward v. Gromett (1859) (7 C.B.N.S. 191), distinguished.

Decision of *DEVLIN, J.* (1951) (115 J.P. 582), affirmed.

APPEAL by the plaintiff from an order of *DEVLIN, J.*, dated Oct. 11, 1951, and reported 115 J.P. 582, in an action for damages for malicious prosecution.

The plaintiff was ordered by a metropolitan magistrate to enter into recognizances and to find two sureties of £20 each to keep the peace and be of good behaviour, or, in default, to serve a month's imprisonment, on an information laid by the second defendant, a police officer, at the instance of the first defendant, a Miss Ribbands. When the action came before *DEVLIN, J.*, a preliminary point was taken by the defendants that there was no case to go to the jury because the statement of claim disclosed no cause of action, the prosecution having been successful. *DEVLIN, J.*, upheld this objection and gave judgment for the defendants.

The plaintiff appeared in person.

Pearl for the first defendant.

G. Howard for the second defendant.

SOMERVELL, L.J., stated the facts and continued: The preliminary objection taken by the defendants was based on the rule that a plaintiff cannot bring proceedings for malicious prosecution unless the prosecution previously brought against him has failed. If he has been convicted, the action does not lie. It was submitted that the rule applied to the present claim. The plaintiff submitted, on the authority of *Steward v. Gromett* (1), that the rule does not apply where a magistrate orders a person to enter into recognizances to keep the peace and be of good behaviour. In such a case, the plaintiff says, it is not necessary that the proceedings should have failed. It was submitted, however, for the defendants that the basis of that decision, creating this exception to the general rule, ceased to exist by reason of provisions of the Summary Jurisdiction Act, 1879, s. 25.

To see whether that is right one must look, in the first instance, at the ratio in *Steward v. Gromett* (1). **ERLE, C.J.**, said:

"The question is, whether the plaintiff had an opportunity of obtaining a determination in his favour on the demand for sureties of the peace."

(1) (1859), 7 C.B.N.S. 191.

He decided that the answer was "No", because, the application being made *ex parte*, the justices were bound to grant the order provided that the statements on oath before them satisfied the general conditions for the exercise of the jurisdiction. WILLIAMS, J., put it in this way:

"In the case of exhibiting articles of the peace, or in the precisely analogous case of demanding sureties of the peace, the proceedings must end against the plaintiff, because he is not allowed to answer; and it is manifestly impossible to say, under those circumstances, that the existence of the proceedings, and the fact that they have not ended favourably to the plaintiff, is evidence of reasonable and probable cause for the defendant's instituting them."

CROWDER, J., said (and this is very much in accordance with ERLE, C.J.):

"The question is, whether the plaintiff had the opportunity of controverting the oath of the defendant before the magistrates? If he had, the rule applies that it is necessary for the plaintiff to show a termination of the proceedings in his own favour."

BYLES, J., in the earlier part of his judgment would appear to be following on precisely the same lines. He says:

"The only objection made on behalf of the defendant, as I understand it, is, that the inquiry here had terminated unfavourably to the plaintiff. Whether that objection is of any force depends upon whether the plaintiff had the opportunity of being heard in his own defence."

Later, however, he indicates that he would want to reserve the point whether in all cases, even if there is a power to appear, the rule that the proceedings must have resulted in the plaintiff's favour necessarily applied. He refers to the power of challenging the issue of a *capias* under the Judgments Act, 1838, s. 3. So far as I follow that section, the *capias* issued *ex parte* though there was a right under s. 6 to challenge it later. That, therefore, was the position and that was the ratio of it in 1859.

The Summary Jurisdiction Act, 1879, s. 25, provides:

"The power of a court of summary jurisdiction, upon complaint of any person, to adjudge a person to enter into a recognizance and find sureties to keep the peace or to be of good behaviour towards such first-mentioned person, shall be exercised by an order upon complaint, and the Summary Jurisdiction Acts shall apply accordingly, and the complainant and defendant and witnesses may be called and examined and cross-examined, and the complainant and defendants shall be subject to costs, as in the case of any other complaint."

The effect of that section was that this jurisdiction was no longer to be exercised *ex parte*. The defendant is before the court and can cross-examine, give evidence, and call witnesses in precisely the same way as in any other proceeding. The learned judge held that that removed the basis of the decision in *Steward v. Gromett* (1) and brought proceedings of this kind under the general rule.

In his submission to us the plaintiff emphasised, first, that in proceedings of this kind there is no conviction. An order to enter into sureties can issue although no criminal offence is disclosed in the complaint. I think that is right. He referred to a passage in *STONE'S JUSTICES' MANUAL*, 1951, vol. 1, p. 301, which says that an order under this procedure is not by way of punishment. It has been said many times that its purpose is to prevent breaches of the peace

(1) (1859), 7 C.B.N.S. 191.

or other types of act against which an order can be directed. The plaintiff also relied on the fact that there was no appeal except possibly—and this does not seem to have been decided—by way of Special Case. There is no appeal in the ordinary way to quarter sessions. He also emphasised the general position under this procedure. As he stated, it is of somewhat vague extent, and there are very pertinent and wise observations in *STONE'S JUSTICES' MANUAL*, particularly with regard to the type of case which falls under "good behaviour" (*ibid.*, p. 303). He submitted, therefore, that we ought to have regard to the nature of this jurisdiction in considering whether there ought not to be a remedy of the kind which he seeks in these proceedings. A great deal of what the plaintiff said might be relevant if anybody was considering the general nature of this jurisdiction and whether it could or could not be more precisely defined. It might also be very relevant if the appropriate authorities were considering whether it would be right to introduce a right of appeal to quarter sessions. But those are not matters with which we are concerned, nor do they, in my opinion, affect the problem before us.

I can put my reasons for coming to that conclusion quite shortly by referring to one passage from a judgment of CROMPTON, J., in *Castrique v. Behrens* (1) which will be found cited in *Bynoe v. Bank of England* (2). That was a confirmation by this court of what I have called the general rule. The passage reads:

"There is no doubt, on principle, and on the authorities, that an action lies for maliciously and without reasonable and probable cause setting the law of this country in motion to the damage of the plaintiff, though not for a mere conspiracy to do so without actual legal damage . . . But in such an action it is essential to show that the proceeding alleged to be instituted maliciously and without probable cause has terminated in favour of the plaintiff, if from its nature it be capable of such a termination. The reason seems to be that, if in the proceeding complained of the decision was against the plaintiff, and was still unreversed, it would not be consistent with the principle on which law is administered for another court, not being a court of appeal, to hold that the decision was come to without reasonable and probable cause."

The principle is there stated as covering a wider field than prosecutions. Where an action of this kind is brought in respect of civil process the plaintiff has, I think, to show special damage. But the principle is the same and it seems to me clear, having regard to the change made by s. 25 of the Act of 1879, that proceedings of this kind before justices are capable of being terminated in favour of the plaintiff. He can appear and give evidence and dispute what is said by the complainant. He may be believed and, if so, no order will be made. The question is not: Was it a prosecution? It is: Were the proceedings capable of being terminated in the plaintiff's favour? I have, therefore, come to the conclusion that the learned judge was right and that the appeal fails and should be dismissed.

DENNING, L.J.: This case concerns the very ancient power of a magistrate to require a man to provide sureties. It appears from the old books that it was of two kinds—surety of the peace, which was authorised by the commission of the peace, and surety for good behaviour, which was authorised by the Justices of the Peace Act, 1361. A magistrate could not order a man to find

(1) (1861), 3 E. & E. 709.

(2) [1902] 1 K.B. 467.

sureties unless just cause was shown on oath. He could not order sureties of the peace unless the accused man had actually threatened the complainant with personal violence or had lain in wait for him to do him violence. He could not order sureties for good behaviour unless the accused man was of evil fame and had actually threatened to break the law of the land or by his conduct had evinced an intention to break it. In either case, if the man failed to find anyone to stand surety for him, the magistrate could commit him to prison. All this was done without the man being heard in his own defence at all. What happened was that the complainant gave evidence on oath of the relevant facts, and, thereupon, the magistrate, if satisfied by the oath, could make an order that the man should give sureties. The order might even be made in his absence. The best discussion of this subject before 1879 will be found in *HAWKINS, PLEAS OF THE CROWN*, vol. 1, c. 28, and *BURN'S JUSTICE OF THE PEACE* (1869), 30th ed., vol. 5, pp. 743-768.

It is quite plain that this procedure was not a prosecution. It was a legal process intended to prevent the man from doing wrong. It was a drastic form of *quia timet* proceedings. As such it had many parallels in ancient times. For instance, in a civil action if there was any suspicion that the defendant intended to abscond, a writ of *capias* would issue to arrest him so as to ensure his attendance in court: see *BLACKSTONE'S COMMENTARIES*, vol. 3, p. 282, and the Judgments Act, 1838. In these cases where the process of the law was invoked without the other party being heard, it was settled law that the injured party could bring an action for damages if he could show that the process was obtained maliciously and without reasonable and probable cause: *Steward v. Gromett* (1). This action was known as an action for malicious process. It differed from malicious prosecution in that there was no need for the plaintiff to prove that he had been acquitted. There could be no question of acquittal because the process issued without his innocence or guilt being decided. It issued, indeed, without his being heard at all. A modern parallel is the issue of a search warrant. If it is obtained maliciously and without reasonable and probable cause, an action lies. Since 1879 an order for sureties has entirely changed its nature. It has ceased to be a mere legal process and has become a full legal hearing. A complaint has to be served on the defendant and he must be given a full opportunity of being heard in his own defence. The procedure is the same as on any other complaint. If the court finds against the defendant, it may order him to find sureties, or, in default, be imprisoned for six months: see the Summary Jurisdiction Act, 1879, s. 25.

The plaintiff argued that, despite this change of procedure, the law remained as it was laid down in *Steward v. Gromett* (1). He said that an order against a man to find sureties was an anomaly, because a man who was friendless and had the misfortune not to be able to find sureties might find himself in prison without being charged with any criminal offence or having been found guilty of it. There was, he said, no appeal from the order and no power to quash it on *certiorari*. The only possible way of questioning it was by Case Stated on a point of law; and that was no remedy in the case of perjury by the complainant. He urged, therefore, that there should be a remedy by an action for malicious process, even though an order had been made against him.

If I thought that an order to find sureties was today a mere legal process, as it was before 1879, I would be in favour of the plaintiff's argument. But I do not think it is today a mere legal process. It now bears many of the characteristics of a criminal proceeding. The procedure is much the same as in the

case of a summary offence. The substance of the matter is not only fear of what the accused man may do, but also a complaint of something he has already done—some words or conduct which give rise to apprehension of disorder or other breach of the law. An order can only be made against him if two things exist—(i) a threat by words or conduct to break the law of the land or to do something which is likely to result in a breach, and (ii) a reasonable fear that this threat will be carried into effect. The order, once made, will result in imprisonment if the accused man has no friends to stand by him. This imprisonment must be founded on something actually done by him. It would be contrary to all principle for a man to be punished, not for what he has already done, but for what he may hereafter do. Hence there must be something actually done by him, such as threats of violence, interference with the course of justice, or other conduct which gives rise to the fear that there will be a breach of the law. It is this conduct which is the subject of the complaint and which must be proved before an order for sureties can be made. In these circumstances it seems to me that the proceedings are analogous to a criminal proceeding and that no action lies for maliciously instituting them unless they have ended favourably for the plaintiff. In the present case they ended unfavourably for the plaintiff. An order was made against him. This action, therefore, does not lie. I agree that the appeal should be dismissed.

ROMER, L.J.: I agree that this appeal fails. I think it is a pity that this point was not set down as a preliminary point of law before the hearing. The action was a substantial one. I understand it was estimated to last three days, and I can well believe that it would. The point of law, if decided, as it has been, against the plaintiff, would have been decisive of the case. Although there may have been good reason for not applying, I should have thought this was the very class of case in which an application ought to have been made under Ord. 25, r. 2, to have the point determined before the hearing so as to save all discovery of documents, the collecting together of witnesses, and so on, and have the question decided at a very early stage. Where there is a point of law which, if decided in one way, is going to be decisive of litigation, advantage ought to be taken of the facilities afforded by the rules of court to have it disposed of at the close of pleadings or very shortly afterwards.

Appeal dismissed.

Solicitors: *Gale & Phelps* (for the first defendant); *Solicitor, Metropolitan Police* (for the second defendant).

G.F.L.B.

HOUSE OF LORDS

(LORD NORMAND, LORD MERRIMAN, LORD REID AND LORD TUCKER)

Jan. 30, 31, Mar. 20, 1952

JAMIESON v. JAMIESON

Divorce—Cruelty—Mental cruelty—Evidence—Effect of Matrimonial Causes Act, 1937, on principles to be applied—Supreme Court of Judicature (Consolidation) Act, 1925 (15 and 16 Geo. 5, c. 49), s. 176 (c), as substituted by the Matrimonial Causes Act, 1937 (1 Edw. 8 and 1 Geo. 6, c. 57), s. 2.

Where it is sought to prove cruelty by evidence of a course of conduct adopted by one spouse with the deliberate intention of wounding and humiliating the other spouse and making his or her life a burden and of a continuance in that conduct in the knowledge that it is severely affecting his or her mental or physical health the offence may be proved by evidence of a number of acts each of which is serious in itself, but it may be even more effectively proved by evidence of a long continued series of minor acts, none of which could be regarded as serious if taken in isolation. The intention need not be proved by direct evidence. It can be inferred from the whole facts and atmosphere disclosed by the evidence. The respondent's acts must be judged in relation to the surrounding circumstances, which include the physical or mental condition and the capacity for endurance or the peculiar susceptibility of the innocent spouse, the intention of the offending spouse, and the offender's knowledge of the actual or probable effect of his conduct on the other's health.

Per curiam: There has been no change in the law of England regarding cruelty consequent on the passing of the Matrimonial Causes Act, 1937, and there is no difference between the law of Scotland and the law of England in relation to this matter.

Meacher v. Meacher (1946) (110 J.P. 355), criticised.

Decision of Court of Session (1951 S.C. 286), reversed.

APPEAL by the wife from an order of the First Division of the Court of Session (the Lord President (LORD COOPER) and LORD CARMONT, LORD KEITH dissentiente) dated Jan. 9, 1951, and reported 1951 S.C. 286, adhering to an interlocutor of the lord ordinary (LORD BLADES) dated July 19, 1950, whereby he sustained a plea by the husband that the wife's averments in an action for divorce on the ground of cruelty were irrelevant and dismissed the action. The husband pleaded that the wife's averments were irrelevant and that the action should be dismissed. This plea was sustained by the lord ordinary.

In the course of his judgment the Lord President referred to "the marked contrast between the language and the phraseology" of the Matrimonial Causes Act, 1937, and the Divorce (Scotland) Act, 1938, in dealing with divorce on the ground of cruelty, and said (1951 S.C. 292):

"Whether it be that the Scottish character is of tougher fibre or of blunter susceptibilities, or that the Calvinist tradition still finds expression in a deeper sanctity of the marriage tie and its obligations, the fact remains that more than one decree on the ground of 'cruelty' has recently been pronounced in England which would not have been granted in Scotland. I conceive it to be the duty of the Scottish courts to continue to apply Scottish law and practice in the same spirit as in the past, and I do not feel called upon to examine narrowly the English decisions which were pressed upon us, for these were pronounced by a foreign court on the construction of a differently worded statute and against a different background of common law, practice and tradition."

The First Division held that the facts averred did not constitute such cruelty

as was required to support an application for divorce, and dismissed the action as irrelevant.

W. Ross M'Lean, Q.C., and *W. R. Grieve* (both of the Scottish Bar) for the wife. *Shevan, Q.C.*, and *D. C. Anderson* (both of the Scottish Bar) for the husband.

The House took time for consideration.

Mar. 20. The following opinions were read.

LORD NORMAND: My Lords, the circumstances which have led to this appeal are set out in the opinion which will be delivered by my noble and learned friend, LORD REID. We have to consider whether the averments of the pursuer and appellant are relevant to infer such cruelty towards her as would justify, according to the law and practice existing at the passing of the Divorce (Scotland) Act, 1938, the granting of a decree of separation a mensa et thoro, and, therefore, of a decree of divorce a vinculo since the passing of that Act.

The action is based on what is conveniently called mental cruelty. Physical violence is not averred, but there are averments of conduct by the respondent causing injury to his wife's health and persisted in after he was aware of its injurious effects. There is also an averment that a continuance of life with the respondent would be seriously injurious to the appellant's health. Mental cruelty was well recognised as a ground for an action of separation long before the passing of the Act of 1938. Thus, in *Aitchison v. Aitchison* (1) LORD LOW held that conduct of a defender, if it was improper and unjustifiable and if it caused injury to the pursuer's health, was a good ground of action, although no physical violence was averred. He distinguished the well-known case of *Russell v. Russell* (2) because in that case there was no evidence of injury to the plaintiff's health. The Lord President found it necessary, in view of some of the arguments addressed to the First Division, to vindicate the jurisdiction of the court to entertain the plea of relevance and to dismiss actions of this sort on consideration of the averments. There ought to be no doubt whatever that, if the defender in such an action as this moves the court to sustain a plea to relevance, the court is bound to entertain the plea and to examine the averments no less strictly than in any other action, nor that, if it comes to the opinion that the averments do not satisfy the test of relevance, its duty is to sustain the plea and dismiss the action. The dismissal of an action when the averments do not satisfy the test of relevance not only saves the parties unnecessary expense but, as the Lord President pointed out, avoids, in a divorce case, the exacerbation of the parties' feelings and the destruction of any chance of reconciliation which are often inseparable from the ventilation in evidence of their charges and counter-charges and mutual suspicions. The test of relevance is the same for all actions; there is not one standard for actions of divorce and another standard for other actions. Counsel for the respondent submitted at the hearing of the appeal that, if the pursuer's averments do not necessarily lead to a conclusion in her favour, the case is not relevant, and he cited in support of that proposition the opinion of LORD HUNTER: *M'Dougal v. MacDougall* (3) (1931 S.C. 114). LORD HUNTER's opinion is entitled to weight, nevertheless I think that the test was not accurately formulated by him. The true proposition is that an action will not be dismissed, as irrelevant unless it must necessarily fail even if all the pursuer's averments are proved. The onus is on the defender who moves to have the action dismissed and there is no onus on the pursuer to show that, if he proves his averments, he is

(1) (1902), 10 S.L.T. 331.

(2) 61 J.P. 771; [1897] A.C. 395.

(3) 1931 S.C. 102.

bound to succeed. In the present case, however, the basis of the judgments both of the lord ordinary and of the learned judges of the majority in the First Division is that, if all the pursuer's averments were proved, she would be bound to fail.

There was some difference of opinion between the Lord President and LORD CARMONT on the question whether a defender's conduct is to be judged by reference to its probable effect on the health of a pursuer of normal susceptibilities or whether it is relevant for a pursuer to aver that the conduct alleged did in fact cause him or her mental suffering and consequent injury to health. Neither of the learned judges proposed a dogmatic answer and for my part I am respectfully inclined to accept the Lord President's view that "the conduct alleged must be judged up to a point by reference to the victim's capacity for endurance in so far as that capacity is or ought to be known to the other spouse". There is the high authority of LORD WATSON in *Mackenzie v. Mackenzie* (1) for the proposition that much depends in each case on its circumstances and, in particular, on the victim's capacity for endurance. That leaves it open to find, after evidence, that the pursuer was the victim of his or her own abnormal hypersensitiveness and not of cruelty inflicted by the defender. But the cases in which such a decision would be possible without evidence must be exceedingly rare, and this case is certainly not one of them. The Lord President, I think, reaches the crux of the case when he says that "where the cruelty is of the type conveniently described as mental cruelty, the guilty spouse must either intend to hurt the victim or at least be unwarrantably indifferent as to the consequences to the victim". There is room for differences of opinion about what kinds of case may be covered by the words "unwarrantably indifferent". I do not propose to go into that because I wish to avoid the discussion of hypothetical cases and because I am of opinion that actual intention to hurt may have in a doubtful case a decisive importance and that such an intention has been averred here. Actual intention to hurt is a circumstance of peculiar importance because conduct which is intended to hurt strikes with a sharper edge than conduct which is the consequence of mere obtuseness or indifference. My noble and learned friends have discussed the averments in the opinions which they will deliver and which I have had the advantage of reading, and they have shown that the appellant has averred a case of actual intention to hurt, wilfully persisted in after the injury to the appellant's health was apparent to the respondent. These averments are, in my opinion, relevant, and they are, I think, supported by sufficiently specific instances of the respondent's alleged cruelty. I, therefore, agree that the action should go to proof.

My Lords, I think that it does not do justice to the averments to take up each alleged incident one by one and hold that it is trivial or that it is not hurtful or cruel and then to say that cumulatively they do not amount to anything grave, weighty or serious. The relationship of marriage is not just the sum of a number of incidents, and in this case it has been overlooked that all the incidents averred are said to have been inspired by the respondent's intention to impose his will on his wife without consideration of her feelings or health. Moreover, it is impossible in the bald averments of a condescendence to convey the effects of the conduct of one spouse on the feelings, and through the feelings on the health, of the other spouse. What on paper may seem little more than a series of pin-pricks may present a very different aspect when it has been developed in evidence, though the evidence does not exceed by a single word the bounds set by the record. These considerations do not derogate from the jurisdiction of the court,

(1) [1895] A.C. 384.

but they do impose special caution in the application of the test of relevance to actions founded on mental cruelty. The observations of noble lords in *Watt (or Thomas) v. Thomas* (1) on the value to be attached in an action of divorce for cruelty to the opinion of the lord ordinary who saw and heard the witnesses, especially the parties, though they are directed to the caution which a court of appeal should observe in reversing the lord ordinary's decision after proof, carry also a warning on the caution to be observed in dismissing an action without proof and on consideration of the averments alone.

The Lord President has suggested that under the Matrimonial Causes Act, 1937, the courts in England have, for the purposes of divorce, adopted in principle a less exacting standard of cruelty than was required for the purposes of separation, whereas the Scottish courts have, in compliance with the express provision of the Divorce (Scotland) Act, 1938, adhered to the principles already established in actions of separation. It would be a misfortune if that were so. Certainly before 1937 the courts of England and Scotland followed the same principles in granting and refusing judicial separation for cruelty. The law they both administered was derived from the ecclesiastical courts, and decisions in Scottish cases and in English cases were cited indifferently in both countries as, indeed, they still are. The position is entirely different from that in the law of divorce for desertion, and I regret an unguarded sentence of mine in *Weatherley v. Weatherley* (2) if it has led to confusion through being thought to apply beyond divorce for desertion, which was the subject-matter of that case.

When divorce on the ground of cruelty was introduced, a difference was made between the language of s. 176 (c) of the Supreme Court of Judicature (Consolidation) Act, 1925, as substituted by s. 2 of the Matrimonial Causes Act, 1937 (now s. 1 (1) (c) of the Act of 1950) and the language of the Divorce (Scotland) Act, 1938, s. 1 (1) (c). The Scottish Act expressly prescribed that the cruelty that shall justify divorce shall be the same cruelty as would justify, according to the law and practice existing at the passing of the Act, the granting of a decree of separation. The English Act had made no reference to existing law or practice. It humbly appears to me that the reason for this difference is not very abstruse. In England before 1937 cruelty played a part, if a subordinate part, as a ground of action in divorce when the husband was the defendant, and, as I understand, the cruelty was the same in kind and degree as the cruelty that would justify a decree of separation in England or in Scotland. In Scotland cruelty had no place as a ground or partial ground of action in divorce, but it had a place as a defence in actions of adherence, and, consequently, in actions of divorce for desertion. But there was a controversy whether a less degree of misconduct would serve as a defence in an action of divorce for desertion than was required as the foundation of a decree of separation. The question was discussed in *Mackenzie v. Mackenzie* (3) and opinions on it were reserved. Accordingly, it was appropriate that the Scottish Act should define the kind and degree of cruelty to be required as the ground of an action for divorce. It was not necessary to do this in the English Act since cruelty was already recognised as a partial ground of action in divorce procedure, and it was cruelty of the same kind and degree as was necessary for separation. If that is the explanation of the difference of language between the two Acts, that difference ought not to have led to any divergence in principle between the law of Scotland and the law of England as regards the kind or degree of cruelty necessary for divorce. It is not necessary in this appeal to consider whether there has been in English cases a departure

(1) [1947] 1 All E.R. 582; [1947] A.C. 484.

(2) 111 J.P. 220; [1947] 1 All E.R. 563; [1947] A.C. 628.

(3) [1895] A.C. 384.

from principles firmly established as part of the law of cruelty before 1937. There may be a difference between the views of individual judges on the value of the facts proved as justifying a finding of cruelty, but that is not a difference of principle. Uniformity of judgment in assessing the value of facts is an ideal which is never attained, even in the courts of a single country. It has sometimes been said in England that the Scottish courts have been too easy and liberal in granting divorce, and sometimes the same has been said in Scotland of the English courts. Allowance in judging of the significance of language or conduct used by one spouse to another must be made for national, local and social habits, but I would find it difficult to sustain an argument that a country, which since the Reformation has allowed divorce for adultery to either spouse and to both spouses and has since 1573 allowed divorce for desertion to either spouse, has consistently followed a tradition more favourable to the sanctity of the marriage tie than a country which permitted no action for divorce in its courts till the year 1857.

On another aspect of the Act of 1938 I respectfully and emphatically agree with the Lord President. The Act does not in any way restrain the development of the law of cruelty as the foundation of actions of separation or of divorce. I wish to add that nothing that I have said should be understood as casting doubt on the decision in *Dunlop v. Dunlop* (1). I think that *M'Donald v. M'Donald* (2) was rightly decided and I agree with the reasoning of the Lord Justice-Clerk in that case. I have had the advantage of reading the opinion about to be delivered by my noble and learned friend LORD MERRIMAN, and I respectfully agree with his observations on the identity of principles of the law of divorce for cruelty in England and Scotland. I agree with the dissenting judgment of LORD KEITH and I would allow the appeal.

LORD MERRIMAN: My Lords, while I wish to make it plain that I cast no doubt on the jurisdiction of the court to entertain in a consistorial cause the plea of relevance, I agree with LORD KEITH that it is desirable to bear in mind, particularly in connection with a charge of cruelty, how much depends on the general picture of the married life of the parties which it is so difficult to appreciate without a proof. Nowhere has the advantage, particularly in this class of case, of seeing and hearing the witnesses been stated more emphatically than in the opinions of LORD THANKERTON and LORD MACMILLAN in *Watt (or Thomas) v. Thomas* (3). It is true that their observations were directed to limiting the right of an appellate tribunal to interfere with the findings of a trial judge who has had that advantage. Nevertheless, the application of these observations to the question before your Lordships may be tested by supposing that the clear and accurate summary of the averments made by the lord ordinary was expressed, after proof, in the same words, *mutatis mutandis*, as a finding of the facts on which a decree of divorce had been pronounced, and that there was sufficient evidence to support those findings. Let it also be supposed that your Lordships were hearing an appeal from a reversal of the lord ordinary by the Inner House, and that their judgment was founded on the version of those facts given by the Lord President, beginning with the words (1951 S.C. 294): "Considerable space is devoted to the sexual relations of the spouses" down to the words (*ibid.*, 295) "so preyed upon her mind that she attempted to commit suicide by putting a gas tube in her mouth." On these suppositions I think that the judgment would be open to criticism in the following respects. First,

(1) 1950 S.C. 227.

(2) 1939 S.C. 173.

(3) [1947] 1 All E.R. 582; [1947] A.C. 484.

it is by no means clear in what sense the question of sexual relations was abandoned. It appears only to have been abandoned as a substantive charge, but not as a basic factor on which much of the subsequent unhappiness between the parties was founded. Secondly, if, as I doubt, it can truly be said that the shortage of house-keeping money was "the main count", it was so because it is said that "on many occasions" the pursuer, with growing children, requested more money than she had had when she was first married, and the husband "always refused to give it to her and in doing so told her that he hated the sight of her." This, and the further statement that the husband had been "frequently rude and threatening to the wife in the presence of the children and had greatly humiliated her", appears in the Lord President's judgment as

"a few allegations of harsh language, some of the incidents being associated with the pursuer's demands for money, and one threat of violence alleged to have been made 'in the winter of 1949'—to throw the pursuer downstairs."

This, which the Lord President describes as an "isolated incident" but which appears to be part of the allegation of humiliation by frequent rudeness and threats in the presence of the children, he finds it impossible to construe as indicative of ferocity or serious malignity of purpose. This statement renders all the more serious the omission in his judgment of any trace of the averment that the husband intended to impose his will on the wife, and, although the Lord President refers to the husband's conduct being said to have caused the pursuer "great grief" and to have been "a considerable strain on her nerves", so that in 1944 she consulted a doctor who is still treating her, he does not refer to the averment that the husband had persisted in what is alleged to be his callous conduct although he was aware not merely that it was causing her grief and putting a considerable strain on her nerves, but that it had caused a serious breakdown in her health. On this version of the facts your Lordships' House would, in my opinion, be justified in holding that a reversal of the trial judge on the ground that it was "a case of lack of accommodation, failure of due consideration, selfish neglect and rudeness of language" and nothing more, would conflict with the principles laid down in *Watt (or Thomas) v. Thomas* (1) because a court which had not had the advantage of seeing and hearing the witnesses had substituted its own findings of the facts for those of the trial judge.

I fully agree with your Lordships that the averment of an intention on the part of the husband to impose his will on the pursuer, and the averment of persistence in his callous conduct, although aware of its effect on his wife's health, both of which are plainly made, are important averments in this case. In saying this, however, I must not be taken to suggest that either in England or in Scotland it is essential to impute to the wrongdoer a wilful intention to injure the aggrieved spouse in order to establish a charge of cruelty. In *Mackenzie v. Mackenzie* (2) LORD WATSON said:

"I do not impute to the appellant that his conduct, cruel and reprehensible though it was in my estimation, was dictated by a wilful intention to injure the respondent."

Likewise in *Kelly v. Kelly* (3), to which I shall recur later, because it is the leading case in England on the subject of cruelty without physical violence, LORD PENZANCE in his judgment in the full court said:

(1) [1947] 1 All E.R. 582; [1947] A.C. 484.

(2) [1895] A.C. 384.

(3) (1869-70), L.R. 2 P. & D. 31, 59.

"He says that he does not desire to injure her, and it has never been asserted that he does."

So, also, in *Squire v. Squire* (1) TUCKER, L.J., said that in his view the law on this point could not be more clearly expressed than in the brief statement quoted from the judgment of SHEARMAN, J., in *Hadden v. Hadden* (2):

"I do not question he had no intention of being cruel but his intentional acts amounted to cruelty."

During the argument, however, the question arose whether the averments of the husband's intention to impose his will on the wife and of persistence in his callous conduct although aware of its effect on her health could legitimately be supported at the proof merely by invoking the presumption that a person intends the natural and probable consequences of his acts. I deprecate the exclusion in advance of any particular method of proving an averment. I make this reservation because I am unable to agree with the Lord President's view that this presumption leads to the conclusion that if injury to health occurs "any" conduct, however meritorious, which brings about that result would be cruelty. I have expressed my own views on this matter recently in *Simpson v. Simpson* (3) and I do not propose to repeat them, but I may, perhaps, be allowed to quote one sentence:

"Without going through the careful examination of the doctrine in *Squire v. Squire* (1) with which I respectfully agree, I venture to suggest that in this jurisdiction, at any rate, we may continue to use the time-honoured maxim, provided always that we remember that it does not express an irrebuttable presumption of law and that it is only to be applied in connection with conduct which can fairly be described as ill-treatment."

I coupled with these views an observation of LORD GREENE, M.R., in *Buchler v. Buchler* (4). In relation to the kindred topic of desertion by expulsion of a wife from the matrimonial home, he said that conduct which did not amount to a justification for withdrawing from cohabitation could not be made so by a wife announcing her intention of leaving her husband if he did not change his conduct. He added:

"This is not, in my opinion, affected by the doctrine that a person must be taken to intend the probable consequences of his acts, for, if the acts are not such as to justify the wife in treating herself as expelled from the matrimonial home, no inference can be drawn from those acts of an intention to expel her."

I do not regard the instances of the patriotic volunteer or of the gallant ship's captain given by the Lord President (1951 S.C. 292, 293) as legitimate illustrations of the doctrine. However, I would not necessarily exclude LORD CARMONT's illustration of the cat (*ibid.*, 298); for if a spouse insisted on introducing one into the home in spite of the knowledge that the other spouse was one of those persons who are made positively ill by the presence of a cat, that familiar pet could not then properly be described as "harmless".

I must now turn to the suggestion of the Lord President that by reason of what he terms "the marked contrast" in the wording of the English and Scottish Acts of 1937 and 1938 there has been a change in the legal conception of cruelty in England. The Lord President expressly concurred with observations

(1) 112 J.P. 319; [1948] 2 All E.R. 51; [1949] P. 51.

(2) (1919), *The Times*, Dec. 5.

(3) 115 J.P. 286; [1951] 1 All E.R. 955; [1951] P. 320.

(4) 111 J.P. 179; [1947] 1 All E.R. 319; [1947] P. 25.

to the same effect in the Inner House in *Dunlop v. Dunlop* (1) which appear to have been prompted by the decision of the Court of Appeal in *Meacher v. Meacher* (2). It would be idle to deny that this case has raised, in England as well as in Scotland, the doubts to which allusion is made in the judgments under appeal. For instance, in his dissenting opinion in *Watt (or Thomas) v. Thomas* (3) Viscount SIMON, in support of the view that in the Scottish Act the words "has been guilty of cruelty" make it difficult to introduce as a necessary condition of divorce that further cruelty must be apprehended, though this was necessary if the remedy of separation was being sought, said:

"In England, at any rate, it has been held by the Court of Appeal that under the Matrimonial Causes Act, 1937 (where, however, the words differ from those used in the Scottish Act) a decree of dissolution on the ground of cruelty is based on past behaviour, and that there is no condition that the decree should be withheld 'unless there is also a reasonable fear that further acts of cruelty will be committed' (*Meacher v. Meacher* (2))."

LORD THANKERTON and LORD MACMILLAN expressly reserved their opinions. I am so fully in agreement with what my noble and learned friend, LORD NORMAND, has said on this matter that I should not have found it necessary to add anything were it not that it may be thought advisable to consider whether the divergence supposed to be represented by these two cases is not, in truth, more apparent than real. I need not pursue what my noble friend has said about the reason for the wording of the Scottish Act. I shall try to show that in this country we do not recognise two degrees of cruelty, although, as the Court of Appeal in *Russell v. Russell* (4) itself decided, conduct which is expressly held not to be cruelty may, nevertheless, be an answer to a suit for restitution of conjugal rights. Suffice it to say that when Parliament, in the Act of 1938, defined the cruelty on which divorce first became permissible in Scotland, it was, in fact, following a precedent set by s. 27 of the Matrimonial Causes Act, 1857, whereby divorce for cruelty was first allowed in England. It is true that the Act of 1857 made it necessary to couple adultery with the charge of cruelty, but it was expressly provided, as in the Scottish Act of 1938, that the cruelty must be such as, without adultery, would have entitled the wife to divorce a mensa et thoro. Elsewhere in the Act of 1857 the word "cruelty" occurs by itself (s. 16), and in s. 31, making cruelty a discretionary bar to divorce, the words are "has been guilty of . . . cruelty". So far as I am aware, however, no distinction has ever been drawn between those phrases in relation to the Act of 1857. But it does not end there. By the Matrimonial Causes Act, 1866, s. 2, if either spouse in a suit instituted for dissolution of marriage opposed the relief sought on the ground, inter alia, of "cruelty", the court might give the respondent the same relief to which he or she would have been entitled if he or she had filed a petition seeking such relief. This section was replaced in substantially the same terms by s. 180 of the Supreme Court of Judicature (Consolidation) Act, 1925. Likewise, in the proviso to s. 176 of that Act, preserving the right of a wife to present a petition on any ground on which she might have done so before the Matrimonial Causes Act, 1923, enabled her to obtain a divorce on the ground of adultery alone, it is provided that on any petition presented by a wife for divorce on the ground of the "adultery and cruelty" of her husband the parties shall be competent and compellable witnesses with regard to "the

(1) 1950 S.C. 227.

(2) 110 J.P. 355; [1946] 2 All E.R. 307; [1946] P. 216.

(3) [1947] 1 All E.R. 582; [1947] A.C. 484.

(4) 61 J.P. 771; [1897] A.C. 395.

cruelty". Again, when by the Summary Jurisdiction (Married Women) Act, 1895, magistrates were enabled to make an order in favour of a wife on the ground of "persistent cruelty" SIR SAMUEL EVANS, P., in *Cornall v. Cornall* (1), said (74 J.P. 380) that cruelty in s. 4 of that Act meant the same thing as cruelty had always meant in the Divorce Court, but with the addition of the element of persistence. This, as has been repeated by the Divisional Court of the Probate Division more than once in recent weeks, precludes the making of an order on a single act, however, grave, but has no other effect on the meaning of "cruelty". Finally, by s. 5 of the Matrimonial Causes Act, 1937, itself, the decree of judicial separation is dealt with by the substitution of two new sub-sections for the corresponding sub-sections of s. 185 of the Judicature Act. The first of these enables a petition to be presented for judicial separation on any grounds on which a petition for divorce might have been presented . . . or on any grounds on which a decree for divorce a mensa et thoro might have been pronounced immediately before the commencement of the Matrimonial Causes Act, 1857. In relation to cruelty that would mean, if s. 176 (c) of the Judicature Act, as substituted by the Matrimonial Causes Act, 1937, s. 2, has really altered the law as regards divorce, that two different standards of cruelty as regards judicial separation are set up in the same sentence of the same sub-section, one based wholly on past behaviour and the other on the need for protection for the future.

I must confess that until I read the argument in *Meacher v. Meacher* (2) which went the length of submitting that *even if it were correct* (the italics are mine) that the practice of the ecclesiastical courts and subsequently of the Divorce Court in granting judicial separation on the ground of cruelty was based wholly on the necessity for future protection, that was not the case under s. 2 of the Matrimonial Causes Act, 1937, which makes no reference to the likelihood of the cruelty continuing or to further cruelty at all, I had never seen or heard the suggestion that the words "has treated the petitioner with cruelty" in that Act had made any difference to the legal conception of cruelty. Nor do I understand why it should be so, merely because cruelty is now by itself a ground for divorce, whereas formerly it had to be coupled with adultery. What that conception is was settled by *Russell v. Russell* (3), a case which, as appears from the judgments under appeal as well as from other Scottish decisions to which we have been referred, is evidently regarded as a leading case in Scotland as well as in England. But it is important to bear in mind that in determining, to use LORD HERSHELL's words in *Russell v. Russell* (3),

" . . . what elements were treated as essential to the constitution of the *saevitia*, or cruelty, which entitled to a divorce "

LORD HERSHELL was careful to point out that judges had not infrequently, when speaking of acts as "cruel", used that word in its popular sense, and not as indicating that the acts were cruel in the legal acceptance of the term, that is to say, such as would entitle to a divorce, and he quoted pronouncements both of LORD STOWELL [in *Popkin v. Popkin* (4) and *D'Aguilar v. D'Aguilar* (5)] and of SIR JOHN NICHOLL [in *Bray v. Bray* (6),] in that sense to illustrate the risk of confusion arising from the use of the words "cruelty" and "cruel" in the popular sense. Therefore, when the legal conception of

(1) (1910), 74 J.P. 379.

(2) 110 J.P. 355; [1946] 2 All E.R. 307; [1946] P. 216.

(3) 61 J.P. 771; [1897] A.C. 395.

(4) (1794), 1 Hag. Ecc. 765, n.

(5) (1794), 1 Hag. Ecc. 773.

(6) (1828), 1 Hag. Ecc. 163.

cruelty is described as being conduct of such a character as to cause danger to life, limb or health, bodily or mental, or to give rise to a reasonable apprehension of such danger, it is vital to bear in mind that it comprises two distinct elements—first, the ill-treatment complained of, and, secondly, the resultant danger or the apprehension thereof. Thus, it is inaccurate, and liable to lead to confusion, if the word "cruelty" is used as descriptive only of the conduct complained of, apart from its effect on the victim.

There seem to me to be some traces of this confusion in *Meacher v. Meacher* (1). For example such phrases as "unless . . . such assaults are likely to continue", "unless there is a reasonable fear that further acts of cruelty will be committed" are used to illustrate the rejection of the proposition that the court intervenes "only to protect the parties from what they expect to happen", as if all these phrases necessarily expressed the same idea. But where, as in that case, a wife has withdrawn from cohabitation because a series of violent assaults has caused danger to limb and health, bodily and mental (for she had not only suffered bodily injuries but had had a nervous breakdown) the expectation of a renewal at least of the apprehension of danger to bodily or mental health, if she were called on to resume cohabitation, is not necessarily the same thing as the likelihood of the continuance of the actual assaults or even as the fear that further "acts of cruelty" will be committed. I say "if she were called on to resume cohabitation" because that test is common to both countries: see for example LORD PENZANCE in *Kelly v. Kelly* (2), and *M'Donald v. M'Donald* (3). In my opinion, it is indisputable that the two-fold test was laid down in *Russell v. Russell* (4) because the majority, both in the Court of Appeal and in your Lordships' House, were satisfied that protection of the aggrieved spouse lay at the root of the matter. But protection from what? Not necessarily from a repetition of the whole course of ill-treatment, or even the same kind or degree of ill-treatment. To use a homely metaphor, the camel needs protection from the last straw which is to break its back, or even from the penultimate straw which threatens to do so, and not only from being laden afresh with another whole bale of straw. That is why it may be confusing to speak of repeating "the cruelty". This is well illustrated by a recent case of *Cooper v. Cooper* (5), decided in your Lordships' House on Mar. 29, 1950. VISCOUNT JOWITT, L.C., in an opinion with which the other noble Lords concurred, said:

"The more serious the original offence, the less grave need be the subsequent matters to constitute cruelty, for the subsequent acts must be looked at in the light of the earlier history from which they derive their significance . . ."

He added that, if authority were needed for such an obvious proposition, it was to be found in *Wilson v. Wilson* (6). Both of these were cases in which, after the wife had left the matrimonial home because of earlier ill-treatment, cohabitation had been resumed. I would add that there have been many other decisions in the intervening century to the same effect, not only in cases where cohabitation has been resumed, but also where it has been continued until what may be called the imposition of the "last straw".

(1) 110 J.P. 355; [1946] 2 All E.R. 307; [1946] P. 216.

(2) (1869-70), L.R. 2 P. & D. 31, 59.

(3) 1939 S.C. 173.

(4) 61 J.P. 771; [1897] A.C. 395.

(5) [1950] W.N. 200.

(6) (1849), 6 Moo. P.C.C. 484.

If I may say so respectfully, the Court of Appeal in *Meacher v. Meacher* (1) was bound to set aside a decision refusing a decree on the grounds, first, that the parties having separated, there was no likelihood of further cruelty, and, secondly, that the court would not intervene on behalf of a wife who could have put a stop to the cruelty by complying with the husband's unreasonable prohibition of visits to her sister. These reasons were manifestly unsound and conflicted in both respects with *Kelly v. Kelly* (2) and *Mackenzie v. Mackenzie* (3). Moreover, there being ample evidence of conduct causing danger to limb or health and of the need for protection if cohabitation were to be resumed, the court was fully justified in drawing its own conclusion that cruelty was proved. But if it was also intended to decide that by reason of the wording of s. 176 (c) of the Judicature Act, as substituted by the Matrimonial Causes Act, 1937, s. 2, it is no longer necessary, in a case where a spouse has withdrawn from cohabitation because of ill-treatment, to consider whether, if he or she were obliged to resume cohabitation, there would not at the least be a reasonable apprehension of danger to life, limb or health, bodily or mental, I feel bound to express my opinion that this is not the law of England. As regards *Dunlop v. Dunlop* (4) on the other hand, I would only say that it is possible to share the scepticism expressed by LORD JAMIESON (1950 S.C. 243) about the certainty, or the permanence, of the drunkard's somewhat rapid reformation without doubting that an English court, if it were fully satisfied that an aggrieved spouse could resume cohabitation without danger to life, limb or health, bodily or mental, or even a reasonable apprehension of such danger, would be bound in principle to arrive at the same conclusion.

Having already referred in passing to *Squire v. Squire* (5), it only remains to say a word about *Lauder v. Lauder* (6), the other decision of the Court of Appeal which, as we were given to understand, was thought by the majority below to represent an extension of the legal conception of cruelty. Here, again, let me say that I am not suggesting for a moment that this or any other English case is binding in Scotland, but, whether the decision itself was right or wrong, at least it can be said that there was no intention to make a departure from established principle. The case was determined in light of the decisions in *Kelly v. Kelly* (2), *Mytton v. Mytton* (7), *Bethune v. Bethune* (8) and *Moss v. Moss* (9). *Meacher v. Meacher* (1) was not even mentioned in the argument. Also, it was expressly insisted that the case was one in which it was pre-eminently necessary to bear in mind the principles laid down in *Russell v. Russell* (10), but it was said ([1949] 1 All E.R. 79) that in applying those principles it was impossible to doubt that if there had been evidence that the wife's conduct had caused any injury to mental health, or a reasonable apprehension of such injury, the decision in the Court of Appeal and in the House of Lords must have been the other way. This distinction had already been drawn by LORD LOW in *Aitchison v. Aitchison* (11) and by SIR FRANCIS JEUNE, P., in *Jeapes v. Jeapes* (12). Moreover, in *Duffy v.*

(1) 110 J.P. 355; [1946] 2 All E.R. 307; [1946] P. 216.

(2) (1869-70), L.R. 2 P. & D. 31, 59.

(3) [1895] A.C. 384.

(4) 1950 S.C. 227.

(5) 112 J.P. 319; [1948] 2 All E.R. 51; [1949] P. 51.

(6) [1949] 1 All E.R. 76; [1949] P. 277.

(7) (1886), 50 J.P. 488; 11 P.D. 141.

(8) [1891] P. 205.

(9) [1916] P. 155.

(10) 61 J.P. 771; [1897] A.C. 395.

(11) (1902), 10 S.L.T. 331.

(12) (1903), 89 L.T. 74.

Duffy (1), LORD JAMIESON referred without disapproval to LORD LOW's judgment in *Aitchison v. Aitchison* (2).

To conclude, I also agree emphatically that the Act of 1938 does not in any way restrain the development of the law of cruelty as the foundation of actions of separation or of divorce. To refer once more to *Kelly v. Kelly* (3), the same thing was said in relation to English law in the judgment of CHANNELL, B., and HANNEN, J., in a passage which was quoted and followed by LORD LOW in *Aitchison v. Aitchison* (2). Like my noble friend LORD NORMAND, I agree with the dissenting judgment of LORD KEITH and would allow the appeal.

LORD REID: My Lords, the appellant in this case is the pursuer in an action for divorce on the ground of cruelty. The respondent pleaded that, the pursuer's averments being irrelevant, the action should be dismissed. This plea was sustained by the lord ordinary by interlocutor of July 19, 1950. The appellant reclaimed against that interlocutor on Jan. 9, 1951, but the First Division by a majority (the Lord President and LORD CARMONT, LORD KEITH dissenting) adhered to the interlocutor of the lord ordinary. This is an appeal against that interlocutor.

The appellant's averments are extensive and I shall attempt to summarise them. The parties were married on Mar. 20, 1936, and they lived together until the appellant left the respondent in February, 1950, about four months after she had raised this action. There were three children of the marriage, born between 1939 and 1945, of whom two survive. The appellant's specific averments are prefaced by this general averment: "Initially the marriage was quite happy, but gradually it became apparent that the defender intended to impose his will upon the pursuer." There are averments regarding the sexual relations of the parties, but these were not relied on by counsel for the appellant except as part of the history of the marriage and throwing light on the relationship of the parties. It is then averred that the appellant's housekeeping allowance was completely inadequate and that on frequent occasions she had to ask the respondent for extra money to meet necessary expenses.

"On such occasions the defender has always refused to give it to her, and in so doing has frequently told the pursuer that he hated the sight of her and shut the door of his bedroom in her face so that the subject could be pursued no further."

It is then averred that

"The defender has also been frequently rude and threatening to his wife in the presence of the children and greatly humiliated her. On one recent occasion in the winter of 1949 the defender in the presence of the children threatened to throw the pursuer down the stairs of their house."

It is not suggested that this latter averment is intended to shew that the pursuer was in any danger from physical violence. Counsel for the appellant presented it rather as an example of the rude, threatening, and humiliating conduct of the respondent averred in the preceding sentence. It is a feature of this case that there is no allegation either of physical violence or of any serious apprehension of violence. Then there are averments that the respondent has failed to entertain the appellant in any way, or to discuss business or financial affairs with her, or to share his life with her in any way, and that he ignored the appellant in the

(1) 1947 S.C. 54.

(2) (1902), 10 S.L.T. 331.

(3) (1869-70), L.R. 2 P. & D. 31, 59.

house. The appellant then avers that the respondent's conduct has undermined her mental and physical health which rapidly deteriorated during the last twelve months of their married life and that she was on the verge of a complete breakdown. It is averred that in 1947 she attempted to commit suicide, and that a continuance of life with her husband

"would be seriously injurious to her life, health and peace of mind, and she is afraid to continue to live with him. The pursuer believes and avers that the defender is fully aware of the cruelty he has inflicted on the pursuer, but at no time has he attempted to be considerate towards his wife or make her life with him happy or even bearable."

I read these averments as alleging a deliberate course of conduct intended to wound and humiliate the appellant and persisted in by the respondent although it was obvious that this was seriously affecting the appellant's mental and physical health. It is true that the appellant's case does not appear to have been presented in this light to the First Division. The argument there presented appears to have been that any conduct by one spouse which injures the health of the other is cruelty whatever may have been the intention of the defender. I am not surprised that the First Division rejected this argument. But there can hardly be a more grave matrimonial offence than to set out on a course of conduct with the deliberate intention of wounding and humiliating the other spouse and making his or her life a burden and then to continue in that course of conduct in the knowledge that it is seriously affecting his or her mental and physical health. Such conduct may consist of a number of acts each of which is serious in itself, but it may well be even more effective if it consists of a long continued series of minor acts no one of which could be regarded as serious if taken in isolation. Once it is established that physical violence is not a necessary ingredient of cruelty—and I think that that has long been recognised by the law of Scotland—then I can see no justification in principle for requiring that the deliberate acts of the defender must be of a certain character, and I know of no authority which requires me to make any such distinction.

If a case is to be remitted for proof it is very undesirable to say anything which may embarrass the future conduct of the case. I do not think that it is necessary for the decision of this appeal to make a detailed examination of the authorities either in Scotland or in England, and I, therefore, refrain from doing so. But to avoid misunderstanding there are some observations of a general character which I think it necessary to make. What I have said is only intended to apply when a deliberate intention such as I have described was the cause of the defender's conduct. Such an intention need not be proved by direct evidence. It may be inferred from the whole facts and atmosphere disclosed by the proof. I do not doubt that there are many cases where cruelty can be established without it being necessary to be satisfied by evidence that the defender had such an intention, but I do not intend to decide anything about such cases. If the defender did not, in fact, intend to ill-treat the pursuer, I desire to reserve my opinion whether or to what extent it is necessary or proper to impute an intention which did not exist by invoking a legal presumption that everyone must be supposed to intend or foresee the natural and probable consequences of his acts, and I also wish to reserve my opinion on the question whether or in what circumstances it can be enough in such cases to prove that a series of comparatively minor incidents has caused injury to the health of the pursuer if the defender was not guilty of deliberately ill-treating the pursuer.

In view of certain observations of the Lord President I think that I must express my opinion on the question whether there is any difference between

the law of Scotland and the law of England as to what the law regards as cruelty. I take the question in two stages. Down to 1937 I can find no difference in principle as to what is cruelty for the purpose of separation *a mensa et thoro*. English cases were copiously cited by Scottish judges and Scottish text writers of authority, and citation of Scottish cases in England was by no means infrequent. It would be somewhat strange if it were otherwise looking to the similar origin of the law in the two countries. That is not to say that there were not differences from time to time in the way in which established principles were applied, but that is a feature of a developing system of law, and, indeed, human nature being what it is, different judges applying the same principles at the same time in the same country to similar facts may sometimes reach different conclusions. In 1937 cruelty became a ground for divorce in England, and in 1938 it became a ground for divorce in Scotland. The two enactments are in different terms and questions have arisen out of this difference, but I do not recollect that anyone has suggested that either enactment altered the established principles by which it must be determined what is sufficient and what is not sufficient to justify a finding of cruelty, and I see nothing in any enactment to require the Scottish courts to depart from established principles, or, indeed, to authorise them to do so. Equally, I see nothing to prevent the Scottish courts from developing the application of those principles in the same way as development takes place in other branches of the common law.

Finally, I do not think that the decision of your Lordships in this case should be taken as casting any doubt on the value of the Scottish procedure of disposing of suitable cases on relevancy without inquiry into the facts, or on the applicability of that procedure to consistorial cases. If it can be shewn that, even if the pursuer succeeds in proving all that he avers, still his case must fail, it appears to me to be highly advantageous that time and money should not be spent on fruitless inquiry into the facts, and this appears to me to be no less advantageous in consistorial cases. But there is this difference between these cases and others. In many of these cases the whole history of the marriage and the demeanour of the witnesses may be specially important when it comes to assessing the bearing of particular facts, and, therefore, before a pursuer's averments are held to be irrelevant, it must be clear that, even if the proof discloses an atmosphere wholly favourable to the pursuer, the pursuer's case would still fail. But if that is clear, as it may be even where cruelty is alleged, then I think that it is proper to dispose of the case on relevancy. I agree that this appeal should be allowed.

LORD TUCKER: My Lords, judges have always carefully refrained from attempting a comprehensive definition of cruelty for the purposes of matrimonial suits and experience has shown the wisdom of this course. It is, in my view, equally undesirable—if not impossible—by judicial pronouncement to create certain categories of acts or conduct as having or lacking the nature or quality which render them capable or incapable in all circumstances of amounting to cruelty in cases where no physical violence is averred. Every such act must be judged in relation to its surrounding circumstances, and the physical or mental condition or susceptibilities of the innocent spouse, the intention of the offending spouse, and the offender's knowledge of the actual or probable effect of his conduct on the other's health (to borrow from the language of LORD KERR) are all matters which may be decisive in determining on which side of the line a particular act or course of conduct lies. For this reason I agree with LORD KERR that it is, generally speaking, not possible to compartment acts for the purposes of relevance as being gross so as to constitute cruelty or less gross so

as not to constitute cruelty, though there may be extreme cases where the acts in themselves are so trivial as to justify dismissal of an action for lack of relevance without proof. It is with regard to the sufficiency of the facts and matters relied on as amounting in the aggregate to cruelty that I think consistorial causes are so different from many other types of action, though I agree with counsel for the respondent that it would be wrong to say that no such suit could ever fail for lack of relevance. In the present instance I think that the averments of knowledge, intention, and persistence remove this case from the area of doubt in which it might otherwise have lain in the absence of such averments.

I agree for the reasons which have been stated by my noble and learned friend, LORD MERRIMAN, that there has been no change in the law of England with regard to cruelty consequent on the passing of the Matrimonial Causes Act, 1937, and, this being so, I can find no difference between the law of Scotland and England in this respect. I also agree with his observations on *Meacher v. Meacher* (1). For these reasons I agree that this appeal should be allowed.

Appeal allowed.

Solicitors: *Burton & Ramsden*, agents for *Balfour & Manson*, Edinburgh (for the wife); *Reid Sharman & Co.*, agents for *Steedman, Ramage & Co.*, Edinburgh (for the husband).

G.F.L.B.

(1) 110 J.P. 355; [1946] 2 All E.R. 307; [1946] P. 216.

COURT OF CRIMINAL APPEAL

(LORD GODDARD, C.J., ORMEROD AND PARKER, JJ.)

Apr. 1, 1952

REG. v. SUMMERS

Criminal Law—Summing-up—Expression “reasonable doubt” to be avoided

Per curiam: In directing a jury in a criminal case it is not advisable to direct them that, if they have a “reasonable doubt” about the guilt of the prisoner they should acquit him. It is better that they should be directed that they should not convict unless they are satisfied by the evidence that the offence has been committed, so that they can feel sure, when they give their verdict, that it is a right one.

APPEAL against conviction and sentence.

The appellant was convicted at Surrey Quarter Sessions of stealing copper from a mausoleum and was sentenced to five years' imprisonment. When arrested and questioned, he said: “How did you find out I was in that? There is no need to put me up for identification . . . I know I am bound to be picked out”. In summing up the chairman told the jury that, if they had a reasonable doubt as to the guilt of the appellant, they should acquit him. He then explained what he meant by “reasonable doubt”. The Court of Criminal Appeal in dismissing the appeal made certain observations on the use of the expression “reasonable doubt” with which this report is concerned.

Buckland for the appellant.

Sir John Cameron for the Crown.

LORD GODDARD, C.J., delivered the judgment of the court in which he stated the facts and continued: There is no ground for interfering with the conviction so far as the evidence is concerned, but the learned single judge gave leave to appeal because of a passage in the summing up. The chairman of quarter sessions said:

"We have used the words 'reasonable doubt'. Some people have difficulty in understanding that. I feel sure you will not have any difficulty in understanding it. If you come to the conclusion on the evidence when you are dealing with these conversations: 'This might have happened, or it might not', that is a reasonable doubt. I do not want you to bring yourself into that frame of mind if your real view is: 'It is just barely possible.' . . . Look at it from the point of view of ordinary people, as if you were considering something in your ordinary lives. Would you, as ordinary people, if this had been something you had been told about by friends of yours, be inclined to believe them or disbelieve them? That is the sort of thing which is meant by 'reasonable doubt'. It is nothing to do with lawyers' jargon; it is merely the sort of judgment which the ordinary man of the world brings to bear on his own affairs, and look at it from that point of view."

In the opinion of the court, no jury hearing that would think that the learned chairman was saying any more than: "If you have a doubt in this matter, remember the case is not proved and you must acquit".

I have never yet heard any court give a real definition of what is a "reasonable doubt", and it would be very much better if that expression was not used. Whenever a court attempts to explain what is meant by it, the explanation tends to result in confusion rather than clarity. It is far better, instead of using the words "reasonable doubt" and then trying to say what is a reasonable doubt, to say to a jury: "You must not convict unless you are satisfied by the evidence given by the prosecution that the offence has been committed". The jury should be told that it is not for the prisoner to prove his innocence, but for the prosecution to prove his guilt, and that it is their duty to regard the evidence and see if it satisfies them so that they can feel sure, when they give their verdict, that it is a right one.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *Solicitor, Metropolitan Police* (for the Crown).

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., OMEROD AND PARKER, JJ.)

Apr. 7, 1952

REG. v. KENT JUSTICES: *Ex parte* MACHIN

Justices—Summary trial of indictable offence—Prisoner not informed of liability to be committed to quarter sessions for sentence—Convictions quashed—Summary Jurisdiction Act, 1879 (42 and 43 Vict., c. 49), s. 17 (2) and Criminal Justice Act, 1925 (15 and 16 Geo. 5, c. 86), s. 24 (2), as amended by Criminal Justice Act, 1948 (11 and 12 Geo. 6, c. 58), s. 79, sched. IX.

The applicant appeared before a magistrates' court charged with larceny and obtaining credit by fraud. He was informed of his right to trial by jury and he consented to be dealt with summarily, but he was not informed of his liability to be committed for sentence to quarter sessions under s. 29 (1) of the Criminal Justice Act, 1948, as is required by s. 17 (2) of the Summary Jurisdiction Act, 1879, and s. 24 (2) of the Criminal Justice Act, 1925, as amended by s. 79 of and sched. IX to the Act of 1948. The magistrates convicted the applicant on both charges, and, after hearing evidence of the applicant's character and antecedents, committed him to quarter sessions for sentence.

HELD: that as the provisions of the statutes of 1879 and 1925 (as amended) were mandatory and as the procedure therein laid down had not been strictly followed, the convictions were bad and *certiorari* must issue to quash them.

Reg. v. Cockshott (62 J.P. 325; [1898] 1 Q.B. 582), applied.

APPLICATION for order of *certiorari*.

The applicant, Machin, appeared before a court of summary jurisdiction for the St. Augustine's division of Kent on charges of obtaining credit by fraud and larceny. He was told by the clerk to the magistrates of his right to trial by jury and consented to be dealt with summarily. He was not, however, told of his liability to be committed to quarter sessions for sentence under s. 29 (1) of the Criminal Justice Act, 1948, if the magistrates, after conviction, on obtaining information as to his character and antecedents, should be of opinion that their powers of punishment were inadequate. The magistrates, having convicted the applicant on both charges, heard evidence of his character and antecedents, and he stated that he wished four outstanding offences to be taken into consideration. The magistrates then committed the applicant to East Kent Quarter Sessions for sentence. The applicant applied for leave to apply for an order of *certiorari* to quash the convictions on the ground of irregularity in procedure, and quarter sessions, on being informed of this, postponed sentence.

Jupp for the applicant.

Edie for the Crown.

LORD GODDARD, C.J.: Counsel for the applicant, Peter Lawrence Machin, moves for an order for *certiorari* to bring up and quash two convictions of the applicant by Kent justices sitting in the St. Augustine's division. The applicant was convicted of obtaining credit by fraud on Aug. 21 and 24, 1951, and of the larceny of two fountain pens, and he was committed to quarter sessions for sentence under s. 29 of the Criminal Justice Act, 1948. Before quarter sessions objection was taken that his convictions were bad, and so they adjourned consideration of the matter to enable it to be argued in this court on an application for an order for *certiorari*.

By s. 29 (1) of the Criminal Justice Act, 1948, power is given to justices to commit such a person as the applicant to quarter sessions for sentence. Under s. 17 (1) and (2) of the Summary Jurisdiction Act, 1879, a person who is charged

before justices with an offence punishable by imprisonment for a term exceeding three months, and under s. 24 (1) and (2) of the Criminal Justice Act, 1925, a person who is charged with an indictable offence which can be dealt with summarily, must be informed of his right to be tried by a jury and must consent to be dealt with summarily, and, further, by the amendments to the sections I have mentioned which are contained in sched. IX to the Act of 1948 it must be explained to him that, if he is convicted by the justices, he may be committed to quarter sessions for sentence under s. 29 of the Act of 1948 if the court, on obtaining information as to his character and antecedents, is of opinion that they are such that greater punishment should be inflicted than they (the justices) have power to inflict. In the present case the procedure prescribed by the earlier Acts was followed, but the applicant was not told of his liability to be committed under s. 29.

There is no question of any advantage having been taken of the applicant. The offences charged against him were undoubtedly offences with which the justices could deal with his consent. He was represented by a solicitor who told the justices that he desired to be dealt with by them. Clearly he consented, but the jurisdiction of justices to deal with cases which are *prima facie* indictable is purely statutory and the provisions of these statutes are preemptory. In 1898 in *Reg. v. Cockshott* (1) the prisoner had been charged with an offence to which s. 17 of the Summary Jurisdiction Act, 1879, applied, and so he was entitled to be told, before he was called on to plead, that he could go for trial if he liked. *Reg. v. Cockshott* (1) shows how strictly the court construes such provisions because in that case the solicitor for the prosecution and the solicitor for the defence were both present in court. They talked together and agreed that the case should be dealt with by the justices. Thereupon no one thought it necessary to tell the prisoner of his right to be tried by a jury because he was represented by a solicitor who had agreed that the case should be treated as a summary case. The court held that the provisions of the statute must be strictly complied with, and, as the prisoner had not been told of his right to be tried by a jury before the trial started, the conviction must be quashed.

Following the reasoning of the court in *Reg. v. Cockshott* (1), we think we must give effect to the provisions of sched. IX to the Act of 1948, and we must, therefore, hold that the order for certiorari must go and these convictions must be quashed because the justices took on themselves, although with the consent of the applicant, to try the cases summarily without a strict compliance with all the statutory provisions which now allow an indictable offence to be dealt with summarily. It was a very venial offence in the justices and one can well understand their overlooking a provision tucked away in a schedule as this one is, but the applicant is entitled to take advantage of it, and, therefore, we hold the committal and the convictions to be bad. That distinguishes this case from *Rez v. South Greenhoe JJ. Ex p. Public Prosecutions (Director)* (2). In that case there had been a strict compliance with the section, but, although the justices had power to convict, for reasons I need not examine now, they had no power to commit the defendant for sentence and so the committal was bad and the case was sent back to the justices to complete the hearing.

The applicant, technically, has never been in peril and he could now be tried over again. He has been seven months in custody, and in those circumstances—it must be a matter for the prosecution, for this court has no power to give directions on the matter—we think it would not be right in the interests of

(1) 62 J.P. 325; [1898] 1 Q.B. 582.

(2) 114 J.P. 312; [1950] 2 All E.R. 42; [1950] 2 K.B. 558.

justice that further proceedings be taken against him for the two cases in which he has been actually convicted. Whether the prosecution consider it right to proceed in the four cases outstanding, which have never been made the subject of a charge, although the applicant wanted them taken into consideration, is a matter for the prosecution.

ORMEROD, J.: I agree.

PARKER, J.: I agree.

Order for certiorari.

Solicitors: *Cunliffe & Airy*, agents for *H. W. S. Homewood*, Canterbury (for the applicant); *W. L. Platts*, county solicitor, Maidstone (for the Crown).

T.R.F.B.

COURT OF CRIMINAL APPEAL

(LORD GODDARD, C.J., ORMEROD AND PARKER, JJ.)

Mar. 31, Apr. 7, 1952

REG. v. OWEN

Criminal Law—Evidence—Witness recalled after conclusion of summing-up.

Although, either before or after retirement, a jury may be further instructed by the judge in reply to any question they may put on any matter on which evidence has been given, once the summing-up is concluded, no further evidence should be put before the jury.

Reg. v. Frost (1840) (9 C. & P. 129), discussed.

Rez v. Broune (1943) (29 Cr. App. R. 106), applied.

APPEAL against conviction.

The appellant was convicted before OLIVER, J., at Cheshire Assizes of carnal knowledge of a girl under sixteen and was sentenced to nine months' imprisonment. At the conclusion of the summing-up the jury retired, and after some time they sent a message to the judge saying that they desired evidence on the question whether a clinic where the offences were alleged to have been committed would be empty or occupied at the material times. The judge recalled a doctor, who had already given evidence regarding the girl's physical condition, and the effect of his evidence was that at the times when the offences were alleged to have been committed no one would be at the clinic unless exceptionally. The jury again retired, and soon afterwards they brought in a verdict of Guilty. The judge granted the appellant a certificate for appeal on the question whether he had been right in allowing a witness to be called after the jury had retired.

J. J. Roberts for the appellant.

E. B. B. Richards for the Crown.

Cur. adv. vult.

April 7. LORD GODDARD, C.J., read the following judgment of the court. The appellant was charged at Chester Assizes before OLIVER, J., with having had carnal knowledge of a girl under the age of sixteen. He was convicted and sentenced to nine months' imprisonment. OLIVER, J., granted a certificate to enable him to appeal, the point of law that arises being whether the judge

was right in allowing a witness to be re-called, after the summing-up and after the jury were enclosed, to deal with a question which the jury put to the judge.

The appellant, a man of some seventy years of age, was a caretaker or porter at a clinic at Blaenau-Festiniog, and it was alleged that on three occasions he took the girl, whose age was fourteen, to the clinic and in a room there, which seems to have been the X-ray room, committed the offences charged. These visits to the clinic all took place at about 3.30 or 4 p.m., when the girl was coming home from school. The police inspector who gave evidence was cross-examined by counsel for the defendant, and, among other questions, these were put to him:

"Q.—So this clinic would be visible to twenty or thirty houses placed on Wynnes Road? A.—Yes. Q.—It is a public place, in other words? A.—Yes. Q.—Indeed, a much frequented place? A.—Undoubtedly. Q.—Doctors go there to attend to their patients, and there are often ten to forty patients awaiting examination at the same time? A.—I cannot say the numbers. OLIVER, J.: Do you know what the clinic hours were? A.—No. Q.—Do you know that doctors do their work in the clinic, and it is a common sight to see people waiting about for their turn to go into the clinic? A.—Yes."

On re-examination he was asked:

"Q.—Do you know whether or not the public go into this dark room? A.—Not to my knowledge."

When the case for the prosecution was closed the appellant gave a complete denial of the charge and the judge summed up. After the jury had retired for some time, they sent a message to the judge saying that they wanted evidence whether the clinic would be empty or occupied at the material times. OLIVER, J., was of opinion that the question was, as he described it, of vital relevance and could have been proved by the prosecution as part of their case, and, as he has stated in his certificate,

"being of opinion that the interests of justice demanded the evidence, and that the defendant would not be unjustly prejudiced if I allowed the evidence, I did so."

The doctor who had previously given evidence as to the girl's physical condition, was re-called, and the effect of his evidence was that at the times when the offences were alleged to have been committed no one, neither doctors nor patients, would be at the clinic unless exceptionally. That evidence having been given, the jury, after a very short retirement, returned a verdict of Guilty.

The question how far evidence may be called by the prosecution after the case has been closed has been discussed in many cases, but in only one in such circumstances as these. It is clear that in his discretion a judge may allow evidence to be called in rebuttal of some case set up for the first time by the defence. The case usually cited as authority on this point is *Reg. v. Frost* (1), where TINDAL, C.J., said:

"There can be no doubt about the general rule, that where the Crown begins a case (as it is with an ordinary plaintiff), they bring forward their evidence, and cannot afterwards support their case by calling fresh witnesses, because there may be evidence in the defence to contradict it. But if any matter arises *ex improviso*, which the Crown could not foresee, supposing it

(1) (1840), 9 C. & P. 129, 159.

to be entirely new matter, which they may be able to answer only by contradictory evidence, they may give evidence in reply."

This, it will be observed, deals only with the right of the Crown to call evidence in rebuttal and does not deal with the question whether evidence can be given after the summing-up. We may also observe that the rule laid down by TINDAL, C.J., is probably in wider language than would be used at the present day. Indeed, in *Rex v. Crippen* (1), the court said in terms that they did not propose to adopt the language of that learned judge and that it was a question for the judge at the trial to determine in his discretion whether the evidence, not having been tendered in-chief, ought to be given as rebutting evidence.

In *Rex v. Harris* (2) the court seems to have re-considered with approval the words we have just cited from *Reg. v. Frost* (3), but that was a case in which the recorder himself called a witness towards the end of the case and examined him himself. In *Rex v. Sullivan* (4) rebutting evidence was called after the speech of counsel for the defence and before the summing-up, apparently to rebut a suggestion in counsel's speech that a particular person had committed the offence with which the prisoner was charged. It was held that the judge had a discretionary power to act as he did and that this court would not interfere unless they were of opinion that an injustice had been caused, whereas in *Rex v. Liddle* (5), the deputy chairman of quarter sessions adjourned a case for three days to enable evidence to be called to rebut the defence of alibi and it was held that the conviction must be quashed as this was an irregularity, the court considering that the nature of the defence was one of so common a kind that it must always be anticipated and it was not proper to take the course there adopted merely for the purpose of rebutting the defence of alibi.

None of these cases—and there are more to the like effect—is really in point in determining the question which falls for decision in this case, and the only case of which we are aware in which the point has actually arisen is *Rex v. Browne* (6). In that case, after the summing-up and the enclosure of the jury, the jury asked the chairman to allow some evidence to be given with regard to the prisoner's state of mind, and, after some pressure, the chairman allowed the prison doctor to be called and he gave evidence on this matter. It is true that in that case there were other grounds for quashing the conviction, but the court, consisting of LORD CALDECOTE, C.J., ASQUITH, J., and CASSELS, J., were of opinion that this was an irregularity and was a reason for quashing the conviction. In the judgment of the court it is stated:

"A jury is sworn to give a verdict according to the evidence. It is not sworn to give a verdict according to any suggestions or propositions which may have been followed up in the course of the trial."

We do not desire in any way to limit the discretion of a judge to admit evidence for the prosecution after the case for the defence has been closed where it becomes necessary to rebut matters which have been raised for the first time by the defence. It is much more likely that this may be necessary nowadays since prisoners are entitled to give evidence on their own behalf whereas in the days of TINDAL, C.J., such evidence could not be given. As we have said, this court in *Rex v. Crippen* (1) declined to adopt the rule that TINDAL, C.J., laid down in

(1) 75 J.P. 141; [1911] 1 K.B. 149.

(2) 91 J.P. 152; [1927] 2 K.B. 587.

(3) (1840), 9 C. & P. 129, 159.

(4) 86 J.P. 167; [1923] 1 K.B. 47.

(5) (1928), 21 Cr. App. 3.

(6) (1943) 29 Cr. App. R. 106, 112.

all its strictness. It must be a matter for the discretion of the judge, which should be applied with caution, but it appears to us that it is quite another thing to say that, after the whole case is concluded and it remains only for the jury to return their verdict, it is right to allow further evidence to be given to clear up some matter which is troubling the jury. In the present case the evidence which was admitted was not evidence by way of rebuttal of any matter set up by the appellant. If it contradicted any evidence, it was that of the police inspector who was a witness for the prosecution.

It is by no means uncommon for a jury to put a question to the judge after he has concluded his summing-up, whether before or after they have retired, and the usual practice is for the judge to tell the jury, if it is the fact, that no evidence on the point has been given and they must take it, therefore, that there is no evidence on it, though, if they ask a question on which evidence has been given, it is right for the judge to remind the jury of the evidence. We think this is the only safe practice, and it ought to be followed. The theory of our law is that he who affirms must prove, and, therefore, it is for the prosecutor to prove his case, and, if there is some matter which the prosecution might have proved, but have not, after the summing-up it is too late to allow further evidence to be given. That is so whether it might have been given by one of the witnesses already called or whether it would necessitate, as in *Rex v. Browne* (1), the calling of a fresh witness. If this were allowed, it is difficult to see what limitation could be put on it. A witness might be called who would then be open to cross-examination and the defence might then apply to call further evidence in answer.

In the present case it is true that the question asked by the jury was most pertinent, and it is not an unfair assumption to make that their verdict depended on the answer which the doctor gave. If he had said that other people were likely to be at the clinic at the time, it is a reasonable assumption that the jury would have returned a verdict of Not Guilty. As his evidence was that generally there were no people about at the time, it is easy to see that the jury thought this was a vital point, and almost immediately after the evidence had been given they returned a verdict of Guilty. We think they ought to have been told that the prosecution had laid before them such evidence as they had thought fit and the evidence could not now be re-opened. It is only fair to OLIVER, J., to say that he himself felt considerable doubt whether it was right to recall the witness. Being on circuit he did not have the advantage of seeing the reports. Had he been able to refer to *Rex v. Browne* (1), he probably would not have admitted the evidence. In any case, we think it right to lay down that, once the summing-up is concluded, no further evidence ought to be given. The jury can be instructed in reply to any question they may put on any matter on which evidence has been given, but no further evidence should be allowed.

Appeal allowed.

Solicitors: Registrar, Court of Criminal Appeal (for the appellant); Hatchett Jones & Co., agents for H. E. Jones, Blaenau-Festiniog (for the Crown).

T.R.F.B.

HOUSE OF LORDS

VISCOUNT SIMON, LORD PORTER, LORD OAKSEY, LORD MORTON OF HENRYTON
AND LORD TUCKER)

Mar. 10, 11, 12, 13, Apr. 9, 1952

HARRIS v. DIRECTOR OF PUBLIC PROSECUTIONS

Criminal Law—Evidence—Criminal acts other than those charged—Proof of intention—Rebuttal of possible defence—Discretion of judge to exclude.

The prosecution may adduce all proper evidence tending to prove the charge against the accused, including evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment without waiting for the accused to set up a specific defence calling for rebuttal, and evidence of similar acts, e.g., to show intention or to rebut a possible defence of accident may properly be admitted, but, though such evidence is strictly admissible, the judge has a discretion to exclude it if it merely tends to deepen suspicion against the accused and its prejudicial effect is out of proportion to its probative value.

Dicta of LORD HERSCHELL, L.C., in *Makin v. A.-G. for New South Wales* (1894), (58 J.P. 148), and LORD DU PARCQ in *Noor Mohamed v. Regem* ([1949] 1 All E.R. 370), applied.

Observations of LORD SUMNER in *Thompson v. Regem* (1918), (82 J.P. 145) and of LORD GODDARD, C.J., in *Re v. Sims* ([1946] 1 All E.R. 701), explained.

APPEAL against a decision of the Court of Criminal Appeal (LORD GODDARD, C.J., BYRNE and PARKER, JJ.), dated Jan. 29, 1952, dismissing an appeal against conviction by the appellant.

The appellant was charged before PEARSON, J., at Leeds Assizes on an indictment containing eight counts with office-breaking and larceny between May and July, 1951. He was acquitted by the jury on the first seven counts and convicted on the eighth. Before the appellant pleaded an application was made by counsel for the defence for a separate trial on the eighth count and that that count should be tried first, counsel submitting that the depositions disclosed no case in respect of the first seven counts and that it would be prejudicial to the appellant to open those counts against him when there was only one count on which there was evidence which could be left to the jury. The learned judge refused the application on the grounds that the charges could all be properly included in one indictment, and that, in his opinion, the appellant would not be embarrassed or prejudiced by the trial of all eight counts together.

Burton, Q.C., and *R. Lyons* for the appellant.

The Attorney-General (Sir Lionel Heald, Q.C.), *Hylton-Foster, Q.C.*, and *Snowden* for the Crown.

The House took time for consideration.

April 9. The following opinions were read.

VISCOUNT SIMON: My Lords, this is an appeal from a decision of the Court of Criminal Appeal which comes before the House in consequence of a certificate given by the Attorney-General that the decision involves a point of law of exceptional public importance and that it is desirable in the public interest that a further appeal should be brought.

The appellant was a member of the city of Bradford police force. He was tried at the Leeds autumn assizes last November before PEARSON, J. on an indictment containing eight counts charging him with office-breaking and larceny on a series of dates in May, June, and July, 1951, by breaking into and entering the premises of a company of fruit and vegetable merchants situated in an enclosed and extensive Bradford market and stealing therefrom various

sums of money. In every case the money stolen was only a part of the amount that the thief, whoever he was, might have taken. In every case the same means of access was used, and in every case the theft occurred in a period during part of which the appellant was on duty in uniform in the course of patrolling the market, and, apparently, at an hour when most of the gates to the market were closed to the general public. But, on the first seven of these occasions, there was no further evidence to associate the appellant specifically with the thefts. On the eighth occasion, however, which was between 6 and 7 o'clock on Sunday morning, July 22, the appellant, who was on solitary duty in the market as before, was found to be just outside the premises by two detective officers who had rushed to the spot on hearing, in the quarters where they were secretly waiting, the ringing of a bell actuated, without the knowledge of the appellant, by the thief's weight when he stepped on the floor of the shop. On this occasion, marked money which had been placed in the till had been abstracted, but it was not found on the appellant when he was arrested. It had been concealed in a coal-bin, not far away from where he was when first seen. The two detectives were well known to the appellant and might have been expected to be at once recognised by him, but when they entered the market, one by climbing over a gate and the other by opening it with some difficulty, though they were in the appellant's view at no great distance, he contended that he had not recognised them at first as members of the police force and so had not moved to join them. He said he thought they were market-men entering the area for some innocent purpose. By the time the two detectives had reached the premises he had disappeared from view and a little later came running up to join them. The time which elapsed between their first sight of him and his return was just sufficient to enable him to have reached the coal-bin and come back.

Before the appellant was arraigned and in the absence of the jury, his counsel asked for the severance of the indictment and urged that the charge contained in the eighth count should be tried first and separately. The learned judge applied s. 5 (3) of the Indictments Act, 1915, and ruled that there was no good reason for ordering a separate trial on the eighth count and that the case fell within r. 3 of sched. I to the Act, since the charges formed part of a series of offences of the same or a similar character. In so deciding, the learned judge was rightly exercising his discretion and no valid objection could be taken to his ruling. It was urged that the first seven counts, if taken alone, would be unsupported by any relevant evidence. But to this the answer was suggested that, if a jury took the view that the resemblance between the different thefts was so close that they must be regarded as the work of a single thief, the evidence of what happened on July 22 might be considered as identifying the criminal on all the counts. The jury, however, returned, as it was entitled to do, a verdict of Not Guilty on the first seven counts, but found the appellant Guilty on the eighth count. He appealed to the Court of Criminal Appeal against this conviction on various grounds, to one of which reference must be made hereafter. His appeal was dismissed, but, as already stated, he obtained the certificate of the Attorney-General that the decision of the Court of Criminal Appeal involved a point of law of exceptional public importance and that a further appeal should be brought. The Criminal Appeal Act, 1907 s. 1 (6), while conferring this power on the Attorney-General, does not require that his certificate should indicate what is the point of law which he considers should in the public interest be thus brought for final decision before this House. In the present instance, moreover, the House was without the assistance usually derived from previous written formulation of the arguments and reasons put forward on either side. On the hearing of the appeal, however, counsel for the

appellant made it clear that his main contention was that evidence as to the thefts that had occurred on the first seven occasions, when the appellant was not shown to be near the shop at the time when they occurred, could not be advanced by the prosecution or considered by the jury as part of the material to prove the charge on the eighth occasion. The Attorney-General presented the problem arising on the appeal more widely and in effect invited the House to deal with a series of authorities beginning with *Makin v. A.-G. for New South Wales* (1) in which limits as to the admissibility of evidence of "similar facts" had been suggested or laid down, and to decide whether the principle enunciated in *Makin's* case (1) should now be treated as modified or its application regarded as extended.

In my opinion, the principle laid down by LORD HERSCHELL, L.C., in *Makin's* case (1) remains the proper principle to apply, and I see no reason for modifying it. *Makin's* case (1) was a decision of the Judicial Committee of the Privy Council, but it was unanimously approved by the House of Lords in *Rex v. Ball* (2) and has been constantly relied on ever since. It is, I think, an error to attempt to draw up a closed list of the sort of cases in which the principle operates. Such a list only provides instances of its general application, whereas what really matters is the principle itself and its proper application to the particular circumstances of the charge that is being tried. It is the application that may sometimes be difficult, and the particular case now before the House illustrates that difficulty. The principle as laid down by LORD HERSCHELL, L.C., is as follows:

"It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."

When LORD HERSCHELL speaks of evidence of other occasions in which the accused was concerned as being admissible to "rebut" a defence which would otherwise be open to the accused, he is not using the vocabulary of civil pleadings and requiring a specific line of defence to be set up before evidence is tendered which would overthrow it. If it were so, instances would arise where magistrates might be urged not to commit for trial, or it might be ruled at the trial, at the end of the prosecution's case, that enough had not been established to displace the presumption of innocence, when all the time evidence properly available to support the prosecution was being withheld. AVORY, J., in giving the judgment of the Divisional Court in *Perkins v. Jeffery* (3), said:

"... in criminal cases, and especially in those where the justices have summary jurisdiction, the admissibility of evidence has to be determined in reference to all the issues which have to be established by the prosecution, and frequently without any indication of the particular defence that is going to be set up."

(1) 58 J.P. 148; [1894] A.C. 57.

(2) 75 J.P. 180; [1911] A.C. 47.

(3) 79 J.P. 425; [1915] 2 K.B. 702.

LORD DU PARCQ pointed out in *Noor Mohamed v. Regem* (1), in commenting on what LORD SUMNER had said in *Thompson v. Regem* (2):

"An accused person need set up no defence other than a general denial of the crime alleged. The plea of Not Guilty may be equivalent to saying: 'Let the prosecution prove its case, if it can', and, having said so much, the accused may take refuge in silence. In such a case it may appear (for instance) that the facts and circumstances of the particular offence charged are consistent with innocent intention, whereas further evidence, which incidentally shows that the accused has committed one or more other offences, may tend to prove that they are consistent only with a guilty intent. The prosecution could not be said, in their Lordships' opinion, to be 'crediting the accused with a fancy defence' if they sought to adduce such evidence."

LORD HERSCHELL's statement in *Makin's case* (3) that evidence of "similar facts" may sometimes be admissible as bearing on the question whether "the acts alleged to constitute the crime charged in the indictment were designed or accidental" deserves close analysis. Sometimes the purpose properly served by such evidence is to help to show that what happened was not an accident. If it was, the accused had nothing to do with it. Sometimes the purpose is to help to show what was the intention with which the accused did the act which he is proved to have done. In a proper case, and subject to the safeguards which LORD HERSCHELL indicates, either purpose is legitimate. SCRUTTON, J., points out the distinction very clearly in *Ball's case* (4). Sometimes the two purposes are served by the same evidence. The substance of the matter appears to me to be that the prosecution may adduce all proper evidence which tends to prove the charge. I do not understand LORD HERSCHELL's words to mean that the prosecution must withhold such evidence until after the accused has set up a specific defence which calls for rebuttal. Where, for instance, *mens rea* is an essential element in guilt, and the facts of the occurrence which is the subject of the charge, standing by themselves, would be consistent with mere accident, there would be nothing wrong in the prosecution seeking to establish the true situation by offering, as part of its case in the first instance, evidence of similar action by the accused at another time which would go to show that he intended to do what he did on the occasion charged and was thus acting criminally. *Rex v. Mortimer* (5) is a good example of this. What LORD SUMNER meant in *Thompson v. Regem* (2) when he denied the right of the prosecution to "credit the accused with fancy defences" was that evidence of similar facts involving the accused ought not to be dragged in to his prejudice without reasonable cause.

There is a second proposition which ought to be added under this head. It is not a rule of law governing the admissibility of evidence, but a rule of judicial practice followed by a judge who is trying a charge of crime when he thinks that the application of the practice is called for. LORD DU PARCQ referred to it in *Noor Mohamed's case* (1) immediately after the passage above quoted, when he said:

"... in all such cases the judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the

(1) [1949] 1 All E.R. 365; [1949] A.C. 182.

(2) 82 J.P. 145; [1918] A.C. 221.

(3) 58 J.P. 148; [1984] A.C. 57.

(4) 75 J.P. 180; [1911] A.C. 47.

(5) (1936), 25 Cr. App. Rep. 150.

interest of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the judge will be right to exclude it. To say this is not to confuse weight with admissibility. The distinction is plain, but cases must occur in which it would be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible. The decision must then be left to the discretion and the sense of fairness of the judge."

This second proposition flows from the duty of the judge when trying a charge of crime to set the essentials of justice above the technical rule if the strict application of the latter would operate unfairly against the accused. If such a case arose, the judge may intimate to the prosecution that evidence of "similar facts" affecting the accused, though admissible, should not be pressed because its probable effect "would be out of proportion to its true evidential value": per LORD MOULTON in *Christie v. Director of Public Prosecutions* (1). Such an intimation rests entirely within the discretion of the judge. It is, of course, clear that evidence of "similar facts" cannot in any case be admissible to support an accusation against the accused unless they are connected in some relevant way with the accused and with his participation in the crime: see LORD SUMNER in *Thompson v. Regem* (2). It is the fact that he was involved in the other occurrences which may negative the inference of accident or establish his mens rea by showing "system", or, again, the other occurrences may sometimes assist to prove his identity, as, for instance, in *Perkins v. Jeffery* (3). But evidence of other occurrences which merely tend to deepen suspicion does not go to prove guilt. This is the ground, as it seems to me, on which the Judicial Committee of the Privy Council allowed the appeal in *Noor Mohamed's case* (4). The Board there took the view that the evidence as to the previous death of the accused's wife was not relevant to prove the charge against him of murdering another woman, and, if it was not relevant, it was at the same time highly prejudicial. It is to be noted that the Judicial Committee did not question the decision in *Rex v. Sims* (5).

It remains to examine certain reported cases dealing with the admissibility of evidence of "similar facts" decided since *Makin's case* (6), to which the Attorney-General referred us. Rightly understood, these cases do not seem to me to involve any enlargement of the area within which evidence of "similar facts" might be admitted. In *Rex v. Smith* (7) the accused was charged with murdering a woman immediately after going through a form of marriage with her by drowning her in a bath in the lodging where they were staying. Evidence was held to be rightly admitted of very similar circumstances which connected the accused with the deaths at a later date of two other women who were drowned in their baths after the accused had gone through a form of marriage with each of them in turn. In all three cases it was shown that the accused benefited by the death. In all three cases the prisoner urged the woman to take a bath and was on the premises when she prepared to do so. The ground on which the evidence of the two later occurrences was admissible was that the occurrences were so alike and the part taken by the accused in arranging what the woman would do was so similar in each case as to get rid of any suggestion of accident.

(1) 78 J.P. 321; [1914] A.C. 545.

(2) 82 J.P. 145; [1918] A.C. 221.

(3) 79 J.P. 425; [1915] 2 K.B. 702.

(4) [1949] 1 All E.R. 365; [1949] A.C. 182.

(5) [1946] 1 All E.R. 697; [1946] K.B. 531.

(6) 58 J.P. 148; [1894] A.C. 57.

(7) (1915), 80 J.P. 31.

The decision in *Smith's* case (1), therefore, involved no extension of the principle laid down in *Makin's* case (2). The challenged evidence was admissible both to show that what happened in the case of the first woman was not an accident and also to show what was the intention with which the accused did what he did. In *Rex v. Armstrong* (3) the accused was indicted for the murder of his wife by administering arsenic to her. The wife was shown to have died from arsenical poisoning, but the defence urged that it was not shown that the husband had administered the poison to her, but that she had committed suicide. The accused had purchased a quantity of arsenic and made it up into a number of small packets, each containing what would constitute a fatal dose, but offered the explanation that he had purchased the poison merely to use it as a weed-killer in his garden. The prosecution called evidence to show that, eight months after the death of his wife, he secretly administered arsenic to another person. The Court of Criminal Appeal held that this evidence was admissible because it went to disprove the suggestion that he had purchased and kept arsenic for an innocent purpose. The decision in *Armstrong's* case (3) appears to me to involve no enlargement of the principle in *Makin's* case (2). LORD HEWART, C.J., rightly observed:

"The fact that he was subsequently found not merely in possession of but actually using for a similar deadly purpose the very kind of poison that caused the death of his wife was evidence from which the jury might infer that that poison was not in his possession at the earlier date for an innocent purpose . . ."

I do not find anything in the report of *Rex v. Bywaters* (4) which could be read as extending the principle of *Makin's* case (2).

In *Rex v. Sims* (5) there is a passage in the judgment of LORD GODDARD, C.J., which appears to have raised doubts in some quarters whether the principle in *Makin's* case (2) was being extended. The Lord Chief Justice observed that one method of approaching the relevant problem is to start with the general proposition that all evidence that is "logically probative" is admissible unless excluded by established rules, and that it would follow that evidence for the prosecution "is admissible irrespective of the issues raised by the defence". It is the words "logically probative" which have raised doubts in some minds. Such a phrase may seem to invite philosophic discussion which would be ill suited to the practical business of applying the criminal law with justice to all concerned. But I do not understand the Lord Chief Justice by the use of such a phrase to be enlarging the ambit of the principle in *Makin's* case (2) at all or to be disregarding the restrictions which LORD HERSCHELL indicated. In one sense, evidence of previous bad conduct, or hearsay evidence, might be regarded as having, logically, a probative value, but, of course, the judgment in *Sims' case* (5) is not opening the door to that. I understand the passage quoted to mean no more than what I have already formulated, viz., that the prosecution may advance proper evidence to prove its case without waiting to ascertain what is the line adopted by the defence. LORD DU PARCQ, in *Noor Mohamed's* case (6) points out the possibility of misunderstanding the Lord Chief Justice's words and proceeds to put his own construction on them. In substance, I

(1) (1915), 80 J.P. 31.

(2) 58 J.P. 148; [1894] A.C. 57.

(3) 86 J.P. 209; [1922] 2 K.B. 555.

(4) (1922), 17 Cr. App. Rep. 66.

(5) [1946] 1 All E.R. 697; [1946] K.B. 531.

(6) [1949] 1 All E.R. 365; [1949] A.C. 182.

agree with his interpretation. There is, however, this to be added. The proper working of the criminal law in this connection depends on the due observance of both the propositions which I have endeavoured to expound in this judgment. While the prosecution may adduce all proper evidence which tends to prove the charge, it must do so with due regard to the warnings contained in the judgments of KENNEDY, J., in *Rez v. Bond* (1) and VISCOUNT SANKEY, L.C., in *Maxwell v. Public Prosecutions (Director)* (2). A criminal trial in this country is conducted for the purpose of deciding whether the prosecution has proved that the accused is guilty of the particular crime charged, and evidence of "similar facts" should be excluded unless such evidence has a really material bearing on the issues to be decided. This, in my opinion, is the way in which LORD SUMNER's observations in *Thompson's case* (3) should be regarded. It should be noted that in that case LORD PARKER OF WADDINGTON was careful to insist that it would be wrong to treat the decision as "laying down any principle capable of general application". With this explanation, I see no reason to differ from the conclusion in *Sims' case* (4). I have already expressed my view of the explanation of the decision in *Noor Mohamed's case* (5). It appears to me to turn on the court's view of the relevance of the earlier facts. So regarded, it is not an authority which ought to raise doubts as to the proper application of the principle in *Makin's case* (6), or as disturbing the two governing propositions which I have set out above.

Lastly, I must refer to *Rez v. Hall* (7). The way in which the judgment of LORD GODDARD, C.J., in that case was framed was manifestly in deference to the passage in *Noor Mohamed's case* (5), which I have already discussed. On any view, the decision of the Court of Criminal Appeal was right, and I trust that the decision now being given by this House may serve to clear up some of the perplexities which *Hall's case* (7) showed to have arisen. It must always be remembered that every case is decided on its own facts, and expressions used, or even principles stated, when the court is considering particular facts, cannot always be applied as if they were absolute rules applicable in all circumstances.

Applying the above general propositions to the case before us, it appears to me that the only difficulty arises from the form of the summing-up. The learned judge, having decided that the eight counts should be tried together, did not warn the jury that the evidence called in support of the earlier counts did not in itself provide confirmation of the last charge. Yet, if the eighth count had been the only charge to be tried, it is difficult to see how the fact that there had been similar thefts of the same pattern before would confirm the allegation that the appellant was the thief on July 22. The eighth count raised two issues: (i) Was the money stolen on July 22? (ii) Is it proved that it was the appellant who stole it? Previous events could not confirm (i), which, indeed, was proved beyond dispute. As for (ii), the accused denied that he was the thief and the fact that someone perpetrated the earlier thefts when the appellant may have been somewhere in the market does not provide material confirmation of his identity as the thief on the last occasion. The case against him on July 22 depended on the facts of that date. Yet the jury may well have been swayed, however illogically, in reaching its verdict on the eighth count by the earlier

(1) 70 J.P. 424; [1906] 2 K.B. 389.

(2) 98 J.P. 387; [1935] A.C. 309.

(3) 82 J.P. 145; [1918] A.C. 221.

(4) [1946] 1 All E.R. 697; [1946] K.B. 531.

(5) [1949] 1 All E.R. 365; [1949] A.C. 182.

(6) 58 J.P. 148; [1894] A.C. 57.

(7) 116 J.P. 43; [1952] 1 All E.R. 66.

evidence. It should have been warned of this danger, especially as *Sims'* case (1) shows that on an indictment containing several counts evidence may be given which supports only some of them: see the observations of LORD HEWART, C.J., in *Rez v. Bailey* (2). One of the grounds stated in the appellant's notice of appeal to the Court of Criminal Appeal was that the learned judge failed to direct the jury that it was its duty to consider each count separately and not to be influenced in its decision on the eighth count by the evidence of the earlier thefts. The learned judge did, indeed, in his summing-up, go through each count separately, but he treated the evidence as cumulative and told the jury that the main question was whether it was satisfied that the appellant "stole the money" without pointing out that the relevant considerations might be somewhat different on the different counts. True it is that the jury by its verdict distinguished between them, but the fact remains that it was not directed to consider what part of the evidence was properly of weight in deciding its verdict on the eighth count.

This leaves a final question to be determined, viz., whether the error can be regarded as immaterial in view of the proviso to s. 4 (1) of the Criminal Appeal Act, 1907, on the ground that no substantial miscarriage of justice has actually occurred. If it could be said that a reasonable jury after being properly directed would, on the evidence properly admissible, without doubt have convicted on the eighth count, the proviso should be applied. This is the test laid down by this House in *Stirland v. Public Prosecutions (Director)* (3). It is sufficient to say that, in the present instance, it would be going too far to make this assumption and the appeal must, therefore, be allowed. Section 44 (3) of the Criminal Justice Act, 1948, gives this House a discretion, when a criminal appeal is determined in favour of the accused, to direct payment out of local funds of costs to meet expenses incurred by him in the appeal to this House or in the prosecution of his appeal to the Court of Criminal Appeal. It is not the practice of the Court of Criminal Appeal to grant a successful appellant costs of an appeal to it save in exceptional circumstances, and, so far as that court is concerned, there is no special reason for disturbing that practice on the present occasion. But I think that the appellant should receive his taxed costs in respect of his appeal to this House. The section requires that this should be done by directing the proper payment out of local funds, but I understand that the Director of Public Prosecutions has already met, or agreed to meet, much of the appellant's expenses, and the effect of the House's order will, therefore, be to require local funds to bear only the balance, if any.

My Lords, my noble and learned friend, LORD PORTER, who is unable to be present today, authorises me to say that he agrees in all respects with this opinion.

LORD OAKSEY: My Lords, I agree with the principles stated by the noble viscount on the Woolsack as to the admissibility of evidence, but I find myself unable to agree with your Lordships' application of those principles to the facts of the case. I agree with your Lordships that the discretion of PEARSON, J., to try the eight counts together ought not to be disturbed. As I understand it, your Lordships are of opinion that the evidence on counts 1 to 7 was relevant on the eighth count, but so slightly relevant that it should have been excluded by the judge. I agree with the principle that the judge at the trial has a discretion to exclude evidence which, though strictly speaking admissible, is only

(1) [1946] 1 All E.R. 697; [1946] K.B. 531.

(2) 88 J.P. 72; [1924] 2 K.B. 300.

(3) 109 J.P. 1; [1944] 2 All E.R. 13; [1944] A.C. 315.

slightly relevant and, if it relates to former offences by the appellant, may have a prejudicial effect out of proportion to its relevance, but I do not agree that that principle is applicable to the facts of this case and I am of opinion that the summing-up of PEARSON, J., and the judgment of the Court of Criminal Appeal were right.

There is, in my opinion, no question of general importance in this appeal. The only question is: Do the facts which were proved as to the thefts referred to in counts 1 to 7 tend so slightly to implicate the accused in the crime in July with which he was charged in the eighth count that they ought to have been excluded? The facts on the eight occasions were, undoubtedly, similar. The premises were the same. The method of entry to the premises was the same. The money taken was less than the money on the premises. The appellant might have broken into the premises while on duty as a police constable when money was stolen, and when he was on leave no thefts took place. The only difference in the July facts was that the appellant was proved then to be close by the premises directly after the alarm was given in circumstances of suspicion. It is, in my opinion, important to observe that there was no direct evidence that the appellant broke in and committed the theft in July. The evidence, of course, was much more cogent than the evidence of May and June, but it was not conclusive and was really only a much stronger case of opportunity. It is true that the admission of the evidence of the facts of May and June involves the suggestion that the appellant committed crimes other than the particular crime on which *ex hypothesi* he was being tried, and, if the only relevance of the facts as to counts 1 to 7 was that he had committed crimes on those occasions, I should agree that evidence of such facts would be inadmissible. But that is not the only relevance of these facts. Their relevance consists and consists only, in my opinion, in the similarities which existed between the facts of May and June and the facts of July. It is one thing to prove that the appellant has committed a number of different crimes on different occasions; it may be a totally different thing to adduce evidence which tends to show that he has committed the same sort of offence in the same circumstances on several occasions. I do not understand your Lordships to hold that the evidence of what happened in July was inadmissible or should have been excluded on any of the counts 1 to 7, and, if that is so, it could, in my opinion, only be because of the same similarities in the evidence, from which it might be inferred that the accused stole the money on the first seven occasions although there was no direct evidence that he was, in fact, present when the money was stolen on any one of those occasions. The question may be tested in this way: Can it be said that no jury could reasonably find that one person committed all eight thefts? In my opinion, the same similarity must be equally relevant whether it is adduced on one count as on the others.

My Lords, I desire to add that I do not agree with the observations made by LORD DU PARCQ in stating the advice tendered to His Majesty in Council in *Noor Mohamed v. Regem* (1), in which he criticised the judgment of the Court of Criminal Appeal in *Rez v. Sims* (2). I do not agree with that criticism, which was not in any way necessary to the decision of the *Noor Mohamed* case (1). I see nothing wrong in approaching the question what evidence is admissible by considering, first, the general rule as to admissibility, and, secondly, what are the exceptions to it. No one doubts that evidence of previous or subsequent bad or criminal conduct on the part of the accused is to

(1) [1949] 1 All E.R. 365; [1949] A.C. 182.

(2) [1946] 1 All E.R. 697; [1946] K.B. 531.

be excluded unless it is relevant to some issue in the case, but it is for the prosecution to prove the guilt of the accused, and the prosecution must, in proving facts which are more consistent than not with the guilt of the accused, negative "a defence which would otherwise be open to the accused" to use the words of LORD HERSCHELL, L.C., in *Makin's* case (1). It is probably impossible to give an exhaustive definition of the kind of defences which may be open to a prisoner or of the kind of bad or criminal conduct which may be relevant to the question of his guilt on the particular charge on which he is being tried. The issue to which the evidence in question was, in my opinion, relevant was whether the appellant was near the premises in July for an innocent purpose or not. For these reasons I agree with the judgment of the Court of Criminal Appeal.

LORD MORTON OF HENRYTON: My Lords, I agree with the speech which has been delivered by my noble and learned friend on the Woolsack. I desire only to add that, in my view, evidence as to the thefts which occurred on the first seven occasions was not admissible for the purpose of the trial of the appellant on the eighth count, because the appellant was not proved to have been near the shop or even in the market, at the time when these thefts occurred. It is, however, quite clear that the learned judge invited the jury to take that evidence into account when considering the eighth count. In making these observations, I do not regard myself as differing in any way from the speech with which I have just expressed my agreement. I make them only for the purpose of explaining why I cannot accept the views which have just been expressed by my noble and learned friend, LORD OAKSEY.

LORD TUCKER: My Lords, for the reasons which have been stated by my noble and learned friend on the Woolsack I concur in the motion which he has proposed. I agree with my noble and learned friend, LORD MORTON OF HENRYTON, that the evidence with regard to the first seven occasions was irrelevant to the charge on the eighth count, but was left to the jury as relevant.

Appeal allowed.

Solicitors: *Sidney Torrance & Co.*, agents for *J. Levi*, Leeds (for the appellant);
Director of Public Prosecutions (for the Crown).

G.F.L.B.

(1) 58 J.P. 148; [1894] A.C. 57.

COURT OF APPEAL

(SIR RAYMOND EVERSHED, M.R., JENKINS AND HODSON, L.JJ.)

Mar. 3, 4, 19, 20, Apr. 7, 1952

PERRY v. PERRY

Desertion—Condonation—Termination—Sexual intercourse—No intention of deserting wife to return to husband.

In July, 1944, the wife deserted the husband, but until October of that year the husband paid weekly visits to her in an endeavour to persuade her to return to him. He did not see the wife at all between October, 1944, and December, 1949. He then received a letter from her, asking for money, and as a result he visited her once a fortnight at her mother's house till March, 1950. On each of these occasions he asked her to return, but she refused. On two or three of these occasions sexual intercourse took place. On Nov. 8, 1950, the husband received a letter from the wife to the effect that she would never live with him again. As a result of the intercourse the wife became pregnant, and a child was born on Dec. 6, 1950. The husband's petition for divorce, presented on May 15, 1951, on the ground of the wife's desertion, was dismissed on the ground that the sexual intercourse between the spouses during the period of three years immediately preceding the presentation of the petition precluded the granting of a decree.

Held: two or three acts of sexual intercourse between a deserted and a deserting spouse did not as a matter of law necessarily terminate a current period of desertion; there must be mutual intention to terminate it, and here the wife had had no such intention; the doctrine of condonation did not apply to the matrimonial offence of desertion as defined in the Matrimonial Causes Act, 1950, s. 1 (1) (b), so as to make sexual intercourse between the spouses within the statutory period of three years an absolute bar to a decree founded upon desertion for that period; and, therefore, the husband was entitled to a decree.

APPEAL by the husband from an order of His Honour JUDGE EMLYN JONES, sitting as commissioner in divorce, dated July 6, 1951, dismissing the petition of the husband for divorce on the ground of the wife's desertion.

Bingham and Sproule Bolton for the husband.

Colin Duncan and Brian T. Neill for the Queen's Proctor.

The wife did not appear.

Cur. adv. vult.

April 7. The following judgments were read:

SIR RAYMOND EVERSHED, M.R.: This appeal is from an order of His Honour JUDGE EMLYN JONES (sitting as commissioner in divorce) dismissing a husband's petition for divorce on the ground of the wife's desertion. The husband and wife were married on July 2, 1939, and there is one child of the marriage born (in circumstances hereafter mentioned) on Dec. 6, 1950. The petition was presented on May 15, 1951, and alleged that the wife had (within the terms of s. 1 (1) (b) of the Matrimonial Causes Act, 1950) deserted the husband without cause for a period of "at least three years", namely, ever since July 6, 1944, "immediately preceding the presentation of the petition". There is no doubt of the facts. The wife did not appear to oppose the petition. Of the husband's evidence the judge said:

"The husband impressed me, and I place this on record, as a truthful and completely honest man, and he told me that even now he was anxious to effect a reconciliation with his wife. It is clear to me that he loved her and still does."

The judge proceeded:

"Upon these facts I am satisfied and so hold that the wife was guilty of desertion on or about July 6, 1944. I am also satisfied that the state of

desertion, thus commenced, continued up to the presentation of the petition in the ordinary sense of the word 'desertion'. That is to say, both the fact of separation and the necessary animus on the wife's part so continued. By 'separation' I mean here only that there was no full resumption of cohabitation in a matrimonial home. Of the wife's animus I need only say that I find that at no time since July, 1944, has she formed any intention to resume married life."

So far, the case appears plain and straightforward, but it also appeared that in December, 1949, the husband received a letter from the wife asking him for financial assistance. He thereupon, and during a period which lasted till the end of March, 1950, went to see her once a fortnight. On these occasions the husband, as the commissioner found, asked the wife to return. She refused. It also appeared that on either two or three occasions during this same period the husband had sexual intercourse with his wife, and it was as a result of one or other of these connections that the child of the marriage was born. As appears from the passage which I have read the commissioner found that at the time these acts of intercourse took place the wife did not in any way resile from her firm and constant intention never to return to her husband. Indeed, on Nov. 8, 1950, she wrote to him as follows:

"Bob, it isn't any use asking me to live with you again because I have fully made up my mind I never will. It is nearly six years since you and I parted and I have never felt at any time as if I wanted to return to you. You know we never get on well together. The love was all on your side. I made a big mistake when I married you. I am sorry, but never ask me again. Goodbye."

It will be observed that that letter was written within a month of the birth of the child conceived as a result of the intercourse in the spring, but that the wife did not even inform her husband of her condition. On these facts the commissioner felt himself bound, by the reasoning of the Divisional Court in *Viney v. Viney* (1), to hold that the acts of intercourse had necessarily put an end to the period of desertion which had begun nearly six years before, and, further, that such earlier desertion could not be revived by the wife's continuing desertion after March, 1950, so as to enable the husband to allege at the date of his petition that the necessary requirements of s. 1 (1) (b) of the Matrimonial Causes Act, 1950, had been satisfied. The commissioner was further of opinion that the decision in *Viney v. Viney* (1) bound him to regard *Whitney v. Whitney* (2), relied on by the husband, as having been wrongly decided by WILLMER, J.

The question raised is clearly one of difficulty and importance, and counsel for the husband has reviewed the history of the law relating to condonation and to the matrimonial offence of desertion. He has invited us to conclude that, neither on authority nor on principle, is the former applicable to the latter, at least in a case where the alleged condonation has occurred before the presentation of the petition, that is, before the desertion has, by the necessary intendment of the statute, ripened, so to speak, into an offence entitling the deserted spouse to repudiate the marriage and pray for its dissolution. The wife did not appear on the appeal, and we, accordingly, requested the Queen's Proctor to attend before us and assist the court by such arguments as he thought it proper to adduce. We are indebted to counsel for the arguments which he has presented to us for the Queen's Proctor. They were to the effect that the commissioner rightly dismissed the petition.

(1) 115 J.P. 397; [1951] 2 All E.R. 204; [1951] P. 457.

(2) 115 J.P. 71; [1951] 1 All E.R. 301; [1951] P. 250.

[His LORDSHIP made observations regarding the undesirability of leading questions being put to witnesses in undefended divorce cases, and continued]: Desertion, which, if it had subsisted for the requisite period, was made a ground for dissolution of marriage by the Matrimonial Causes Act, 1937, was not an offence known to the ecclesiastical or common law founding a decree of separation. Before the Matrimonial Causes Act, 1857, the only remedy for desertion was a suit for restitution of conjugal rights. By s. 16 of the last-mentioned Act, however, "desertion without cause for two years and upwards" was made a ground whereon either spouse might obtain a decree of judicial separation, and by s. 27 desertion "without reasonable excuse" for a like period became, if coupled with adultery, a ground for dissolution of marriage at the suit of a wife: see *RAYDEN ON DIVORCE*, 5th ed., at p. 99. It is not in dispute that the period of desertion now required by the Matrimonial Causes Act, 1950 (which is in the same terms as that introduced into the Matrimonial Causes Act, 1937) must be a single period continuing up to the date of presentation of the petition, in the latter respect differing from the periods of desertion specified in the Act of 1857. Terms broken by one or more periods of resumed cohabitation which in total amount to three years or more will not suffice. In the present case, therefore, the five and three-quarter years of desertion from July, 1944, before the period of the acts of sexual intercourse are disqualified since they did not end with the presentation of the petition nor can the period from March, 1950, after the acts of intercourse, to May 15, 1951, which admittedly did so end, but is in duration but thirteen or fourteen months, be added to that which preceded the acts of intercourse.

It is, therefore, clear that desertion as a ground for divorce differs from the statutory grounds of adultery and cruelty in one important respect. The offence founding the cause of action is not complete—is (as it were) inchoate—until the action is constituted. If one spouse has committed adultery or has treated the other with cruelty, the latter has an accrued right to petition for divorce. He or she may at once repudiate the marriage and is no longer bound to affirm it and reinstate the offending spouse. The deserted spouse has no such right, no such election. If the deserting spouse genuinely desires to return, his or her partner cannot refuse reinstatement. It is, moreover (as *DENNING, L.J.*, observed in *Bartram v. Bartram* (1)), contrary to public policy that the deserted spouse, desiring a resumption of cohabitation and bound to affirm the marriage, should be embarrassed in efforts for reconciliation. It is because of these essential characteristics that, according to counsel for the husband, what is known as "condonation" cannot be properly applicable to the offence of desertion prior to presentation of the petition. Counsel for the Queen's Proctor has not, indeed, contended to the contrary. The burden of his argument is not that an act, or, as in this case, two or three acts, of sexual intercourse should be taken to amount to "condonation" by a husband of a deserting wife (involving directly or by analogy the conditions and consequences attaching to "condonation" as applied to adultery or cruelty), but rather that such an act or acts must involve necessarily such a resumption of cohabitation, of the marital relationship, that the preceding desertion is altogether ended and its consequences wiped away.

Notwithstanding the concession of counsel for the Queen's Proctor as regards "condonation" it will be necessary for me to consider its character and implication hereafter, having regard to the views expressed in *Viney v. Viney* (2). It is convenient, first, to observe that it is clear—and also agreed between counsel—

(1) 113 J.P. 422; [1949] 2 All E.R. 270; [1950] P. 1.

(2) 115 J.P. 397; [1951] 2 All E.R. 204; [1951] P. 457.

that "desertion" postulates both (i) the factum of separation and (ii) a continuing animus deserendi on the part of the deserting spouse. In light of the observations of the House of Lords, and particularly LORD MACMILLAN, in *Pratt v. Pratt* (1), it may also be relevant to consider the state of mind of the deserted spouse, the husband. In the circumstances of the present case, as found by the judge, nothing is added to the case by any such consideration. It follows, however, as counsel for the Queen's Proctor emphasised, that the absence at any time of either the fact of separation or the intent to desert necessarily puts an end to the desertion; and, though the judge in this case found the wife's animus deserendi to have continued without break up to May 15, 1951, it is the case for the Queen's Proctor that the acts of intercourse that occurred are inconsistent with separation in fact or in law at the time they occurred.

The conception of condonation as understood in England is older than that of divorce according to statute, to which it is now related. Historically it could not have been applied to continuing desertion as a ground for divorce, but that is no necessary reason why it should not be applied now. It is unnecessary for me to refer to any of the older material to which counsel for the husband drew attention, for the implications of condonation have recently been authoritatively stated, for example, by McCARDIE, J., in *Cramp v. Cramp & Freeman* (2) ([1920] P. 158) and, more particularly, by VISCOUNT SIMON, L.C., in *Henderson v. Henderson & Orellin* (3) ([1944] 1 All E.R. 45). It involves, in the language of VISCOUNT SIMON, L.C., forgiveness confirmed or made effective by reinstatement. By the law of England it is no less clearly established that the so-called "forgiveness" is conditional—conditional on the "condoned" spouse thereafter fulfilling in all respects the obligations of marriage—so that, if any matrimonial offence is afterwards committed by him or her—whether or not the same as that "condoned" and whether or not in itself giving ground for divorce—the "condonation" ceases to have effect. The offence "condoned" and all its consequences are for all purposes "revived". It was this characteristic which caused McCARDIE, J., in *Cramp v. Cramp* (2) to observe that the word "forgiveness" (at least as it is understood in the Christian religion) was misleading as an interpretation of "condonation", and that the real import of the latter was "a conditional waiver of the right of the injured spouse to take matrimonial proceedings". So, in the present case counsel for the Queen's Proctor was content to submit that by "condonation" was implied a "conditional sacrifice of an accrued right".

At any rate, the notion of "forgiveness made effective by reinstatement" implies, in my judgment, a right of election on the part of the injured spouse and does not fit the case of a deserted spouse who must always, until presentation of the petition at least, affirm the marriage and be ready to take back the deserting spouse. It is, moreover, naturally applicable to an act committed or a course of conduct rather than to a state of mind, which is the second characteristic of desertion. Finally, the conditional quality of "condonation" and the liability of the condoned offence to be "revived" by subsequent misconduct cannot be made to fit with continuing, but (as regards remedy) incomplete, desertion, for it seems to be established that a period of desertion once terminated cannot afterwards be relied on, when added to a later period of desertion or otherwise, to satisfy the requirements of s. 1 (1) (b) of the Matrimonial Causes Act, 1950. In this connection it is to be noted that under the Act of 1857 where a husband

(1) [1939] 3 All E.R. 437; [1939] A.C. 417.

(2) [1920] P. 158.

(3) [1944] 1 All E.R. 44; [1944] A.C. 49.

had committed adultery and had also committed the offence of desertion without reasonable cause for two years, but the wife had condoned the adultery, subsequent matrimonial misconduct by the husband was held to revive not only the adultery but the desertion: *Blandford v. Blandford* (1).

Whatever, therefore, may be the situation where acts which in the case, for example, of adultery would have constituted condonation have taken place after presentation of a petition for divorce on the ground of desertion (as occurred in *Maslin v. Maslin* (2), on which I express no opinion) the conception of condonation has, in my judgment, no application, either in strictness or by analogy (save, perhaps, indirectly to the extent later mentioned in regard to resumed cohabitation), to a current period of desertion. I do not forget that desertion, though of a character not sufficient to give grounds for divorce, is, nevertheless, a matrimonial offence. Even if such an offence could be said to be "condoned" by some act or conduct not involving a resumption of the marital relationship, such a condonation would be in principle "conditional" so that the offence would be for all purposes revived by subsequent misconduct: see *Blandford v. Blandford* (1), and see, as regards the old so-called "statutory desertion", *Paine v. Paine* (3).

It follows from what I have said that I have formed a view different from that which I understand to have been entertained by LORD MERRIMAN, P., and HAVERS, J., in *Viney v. Viney* (4). For, although in reference to his own previous decision in *Mummery v. Mummery* (5) the President said (115 J.P. 399):

"The question was whether the desertion theretofore established was interrupted, or, alternatively, condoned . . ."

he seemed to treat, as also did HAVERS, J., the matter afterwards as turning solely on condonation or to have regarded the two alternatives as being in truth the same. He continued (*ibid.*):

"The two things which it is, in my opinion, vital to remember in *Mummery v. Mummery* (5) . . . are these (i) that it was the wife who was the petitioner, not the husband, and (ii) that there was no bilateral intention to resume cohabitation."

He then refers to *Henderson v. Henderson & Crellin* (6), observing that that case (*ibid.*)

" . . . re-emphasised in unmistakable manner the essential difference between the position of a husband and that of a wife in relation to evidence of sexual intercourse as proof of condonation."

On such a matter I express with the utmost diffidence a view different from that of LORD MERRIMAN, P., but, in my judgment, with the question, aye or no, has there been condonation on the part of the injured spouse "bilateral" (by which I understand is meant "common" or "mutual") intention has nothing to do. As the House of Lords decided in *Henderson v. Henderson & Crellin* (6) sexual intercourse is conclusive proof of condonation of adultery by a husband who has knowledge of the adultery and in the absence of fraud by the wife, whatever may have been in fact the intention of either spouse. That it may not be so in the case of an injured wife depends on the proposition that the situations of a

(1) (1883), 8 P.D. 19.

(2) 16 J.P. 136; [1952] 1 All E.R. 477.

(3) [1903] P. 263.

(4) 115 J.P. 397; [1951] 2 All E.R. 204; [1951] P. 457.

(5) [1942] 1 All E.R. 553; [1942] P. 107.

(6) [1944] 1 All E.R. 44; [1944] A.C. 49.

husband and wife are not entirely the same. Historically they plainly were not, and modern legislation may be said not effectively to have been capable of eliminating all biological differences. Still, the difference in situation is not obvious in a case where the wife has voluntarily left her husband and has for years been living entirely separate from and independent of him.

I add that my conclusion is, as I think, reinforced by the circumstance that by s. 4 (2) (b) of the Matrimonial Causes Act, 1950, condonation of adultery or cruelty is expressly made a bar to a decree, but there is no reference to condonation in relation to desertion, as there is not, though the reason may be different, in relation to continuing unsoundness of mind made a ground of divorce by s. 1 (1) (d). It is true that there is no reference to condonation as regards a petition by the wife on the ground that her husband has been guilty of rape, sodomy or bestiality, but in those cases condonation may clearly be made applicable by analogy, and in any case condonation was regarded by the ecclesiastical courts prior to 1857 as a bar to divorce *a mensa et thoro* on the ground of bestiality no less than on the grounds of adultery or cruelty.

There remains, however, the question—the main argument of counsel for the Queen's Proctor—whether an act of sexual intercourse, or at least two or three acts such as were proved in the present case, should be treated against a husband petitioner as constituting such a resumption of the marital relationship as puts a stop, for good and all, to the precedent period of desertion by the wife. There is no doubt that resumption of marital relationship or resumption of cohabitation (for the purpose I treat the two formulae as synonymous) puts an end to desertion. The proposition has been clearly recognised by Parliament: see, for example, the Summary Jurisdiction (Married Women) Act, 1895, s. 7, the Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 2 (2), and the Matrimonial Causes Act, 1937, s. 6 (3), re-enacted by the Matrimonial Causes Act, 1950, s. 7 (3). Approaching the matter as *res integra* and without regard to authority, I should have thought that the question whether cohabitation or marital relationship has or has not been resumed is a question of fact and degree to be determined according to common-sense principles.

Sexual intercourse is beyond doubt a most important incident in the relationship, though its significance will obviously vary, for example, according to the age of the spouses. Still, I should not have thought (again treating the matter without reference to authority) that an act, or two or three acts, of intercourse without more could sensibly be regarded as necessarily determining the question, and I should also have thought that mutual or "bilateral" intention was in this matter essential. Without attempting a definition, the implication of desertion is a rejection of all the obligations of marriage. It has been held by the House of Lords in *Weatherley v. Weatherley* (1) that absolute refusal of sexual relations by one spouse, who in other respects fulfils the duties of marriage, could not amount to desertion, and, if this is so, it does not seem to me shocking or unreasonable that participation in one or two acts of intercourse by a husband or wife, who in all other respects repudiated the marital relationship, should not be regarded as necessarily constituting a resumption of such relationship. If this view be right, then on the facts found in the present case I should conclude that there had been no such resumption.

In my judgment, the *prima facie* view which I have expressed is supported by the authorities. More particularly I think that, on authority, mutual intention is of the essence of the matter. LORD MERRIMAN, P., so stated in *Mummery*

(1) 111 J.P. 220; [1947] 1 All E.R. 563; [1947] A.C. 628.

v. *Mummary* (1), and his view was expressly confirmed by the Court of Appeal in *Bartram v. Bartram* (2). In that case BUCKNILL, L.J., said (113 J.P. 425):

"In the present case, the husband has established actual desertion by the wife for many months. That being so, it seems to me that the husband is entitled to say that the desertion once established continues until it is proved that it has been brought to an end. The wife does not suggest for one moment that she brought it to an end. The question is: Do the facts proved establish that it was brought to an end? In my view, it can only be brought to an end if the facts show an intention on the part of the wife to set up a matrimonial home with the husband. If the facts do not establish any intention on the part of the wife to set up a matrimonial home, the mere fact that, as a lodger, she went to live under the same roof as her husband, because she had nowhere else to go, does not remove the desertion which she had already started and which continued to run."

According to ASQUITH, L.J. (*ibid.*):

"Having regard to those and other proved circumstances in the case, it seems to me wrong to hold that the three years period was interrupted by any resumption of cohabitation, for such resumption involves, in the language of LORD MERRIMAN, P., in *Mummary v. Mummary* (1), a bilateral intention on the part of both spouses to set up a matrimonial home together. In my view, the facts proved in this case negative any such intention on the part of the wife who was not a free agent but was acting under the spur of . . . necessity . . ."

I have already referred to the judgment to the like effect of DENNING, L.J. *Bartram v. Bartram* (2) is binding on this court and on principle, in my view, concludes the present case in the husband's favour.

We were referred to a number of other cases, but none of them, in my judgment, so qualifies the effect of *Bartram v. Bartram* (2) as to compel me to hold that the acts of intercourse proved in the present case must be treated, as against the husband, as conclusive of the resumption of the marital relationship. That such acts will be evidence of such a resumption I do not doubt, and it may even be (on an analogy to this limited extent from condonation) that they will weigh somewhat more heavily against a husband than a wife. Mutual intention must, in my view, on proper evidence be proved, and I find no authority, pace the Divisional Court in *Viney v. Viney* (3), that there is as regards desertion some strict rule which distinguishes the case of a petition by a husband from that of a petition by a wife and compels the court to conclude against the former if any act of sexual intercourse has (with knowledge and in the absence of fraud) been proved. The decision in *Abercrombie v. Abercrombie* (4) by no means turned on the fact that there had been acts of sexual intercourse, but rather on the fact that to such extent as the limitations of the circumstances imposed on them the two spouses had in truth resumed matrimonial relationship. In *Robinson v. Gosnold* (5) HOLT, C.J., expressed the opinion that an act of intercourse with a wife who had deserted re-imposed on a husband liability for her debts. The opinion was obiter and given long before desertion for a period continuing to the date of presentation of the petition was made a ground of divorce. In

(1) [1942] 1 All E.R. 553; [1942] P. 107.

(2) 113 J.P. 422; [1949] 2 All E.R. 270; [1950] P. 1.

(3) 115 J.P. 397; [1951] 2 All E.R. 204; [1951] P. 457.

(4) 107 J.P. 200; [1943] 2 All E.R. 465.

(5) (1794), 6 Mod. Rep. 171.

Rowell v. Rowell (1) the question was of a somewhat different character, whether the essential condition of a deed of separation had been determined by what LORD RUSSELL OF KILLOWEN, C.J. (presiding in this court), called "casual and intermittent connection". The court answered the question negatively and the reasoning at least lends, in my judgment, and has been regarded as lending, support to the view at which I have arrived. Though I have ventured to differ from certain of the views expressed by the Divisional Court in *Viney v. Viney* (2) (which was an adultery case), I must not be taken to be suggesting that on its facts that case was wrongly decided, nor to be deciding that also on its facts WILLMER, J., rightly decided *Whitney v. Whitney* (3), but I am unable to agree with the Divisional Court that in the last named case WILLMER, J., misdirected himself on the law.

There remains the point that—particularly having regard to the birth of the child in December, 1950—it is contrary to common sense to suppose that at the time of the proved acts of intercourse and of the conception of the child its parents were separated in fact and truth. I am unable to agree. If the right view is that there must be some reality of resumed cohabitation to stop the running of desertion, common sense is by no means offended by my conclusion. The question is of the inference to be drawn from acts of intercourse. To that question the birth of the child appears to me to be an irrelevant misfortune. The quality of the acts of intercourse cannot be affected by the accident of their result. Nor can I think that it would as a matter of public policy be desirable that matters of this kind should involve possible questions of dispute about the use of contraceptives.

The industry of counsel enables them to put before us references to the relevant law in the United States of America and Australia, and out of respect to that industry I should like to conclude this judgment by some references to that law. In America the matter seems to be regarded as doubtful. In the *CORPUS JURIS SECUNDUM*, vol. 27, s. 59, it is stated:

"Offenses which may be condoned. It has been held that the doctrine of condonation applies to all charges of matrimonial misconduct, although it has also been held that the doctrine is inapplicable to causes of a continuing character. Condonation has been held to apply to adultery and to desertion."

See also BISHOP (1891 ed., s. 1773). Of the cases cited *Danforth v. Danforth* (4), *Kennedy v. Kennedy* (5), and, perhaps, *Dickerson v. Dickerson* (6) support the view I have expressed. On the other side is *Burk v. Burk* (7) decided in West Virginia in 1883, but it may be said that the judges in the last case were expressing the strong view then held in that State as regards all divorce. The president of the court began his judgment (21 West Virginia Reps. 449):

"This will be the first reported divorce case in this State. We would gladly wish that it might be the last."

The material part of his judgment is as follows (*ibid.*, 453):

"To constitute 'desertion' within the meaning of the statute, there must

(1) [1900] 1 Q.B. 9.

(2) 115 J.P. 397; [1951] 2 All E.R. 204; [1951] P. 457.

(3) 115 J.P. 71; [1951] 1 All E.R. 301; [1951] P. 250.

(4) (1895), 33 Atlantic Reps. 781.

(5) (1877), 87 Illinois Reps. 250.

(6) (1919), 207 South Western Reps. 941.

(7) (1883), 21 West Virginia Reps. 445.

be a combination of two things: an intention to desert, and an actual breaking off of the matrimonial cohabitation. The matrimonial cohabitation cannot be broken off by the mere fact of living in separate houses, while the husband constantly or at any time occupies the marriage-bed. If such a thing could be for a moment tolerated, then a man would have a legal warrant for the space of three years to make his wife his mere mistress, an act as shocking to the law as it is to morality and religion."

Of the Australian cases cited, in *Andrews v. Andrews* (1), decided by the full Court of Queensland, and in *Upton v. Upton* (2) and *Timms v. Timms* (3), both before the full Court of Victoria, the husband was in each case the deserter. The decisions were uniformly to the effect that the desertion was not stopped or condoned by "casual" acts of intercourse on the ground that the matrimonial relationship had not thereby been re-established. In the South Australian case of *Struthers v. Struthers* (4) the question did not directly arise since there had been clearly a resumption of full cohabitation. But SIR MELLIS NAPIER, C.J., in delivering the judgment of the full court, referred to the other Australian cases apparently without disapproval and without distinguishing between the cases of a deserting husband and a deserting wife. He said ([1943] South Australia Reps. 92):

"We have referred to the cases which show that desertion is not terminated or interrupted by casual acts of intercourse or casual visits, without any return to the routine of common life, or anything resembling 'the re-establishment of the matrimonial relationship' (*Timms v. Timms* (3)). There may be condonation which is not followed by cohabitation, and it would be contrary to public policy to treat a casual return, for the purpose of exploring the possibilities of reconciliation, as a resumption of cohabitation"

—language anticipating that used seven years later by DENNING, L.J., in *Bartram v. Bartram* (5). On the other hand, in the later South Australian case of *Fairey v. Fairey* (6), REID, J., held that in the case of a deserting wife a single act of intercourse amounted to condonation on the husband's part. He relied, however, on the fact that by the express terms of s. 11 of the South Australian Matrimonial Causes Act condonation is applicable, indifferently, to all grounds of divorce, thereby distinguishing his case from the cases decided in Victoria where by the local Marriage Acts condonation is not expressly made a ground for refusing a decree in a suit for divorce based only on desertion. *Fairey v. Fairey* (6) is thus no less inapplicable to a case decided under the Matrimonial Causes Act, 1950, of this country. It appears, therefore, that the weight of the American and Australian authority cited to us is consonant with the view which is, in my judgment, correct in principle and which in any case *Bartram v. Bartram* (5) binds us to adopt. For the reasons which I have stated I think that the appeal should be allowed and that the husband is entitled to his decree.

JENKINS, L.J.: This being an undefended case the evidence comprises only the barest outline of the facts elicited, as is, unfortunately, too often the case in undefended causes, from the petitioner husband largely by leading questions. [His LORDSHIP stated the facts.] The learned commissioner formed a most

(1) [1938] Queensland Reports 72.

(2) [1919] Victoria Reports 612.

(3) [1925] Victoria Reports 597.

(4) [1943] South Australia Reports 89.

(5) 113 J.P. 422; [1949] 2 All E.R. 270; [1950] P. 1.

(6) [1947] South Australia Reports 69.

favourable view of the husband as a truthful and completely honest man, and his conclusion on the facts was that the wife was entirely to blame, and was guilty on July 6, 1944, of desertion which

"continued up to the presentation of the petition in the ordinary sense of the word desertion. That is to say both the fact of separation and the necessary animus on the wife's part so continued."

He added:

"By 'separation' I mean here only that there was no full resumption of cohabitation in the matrimonial home. Of the wife's animus I need only say that I find that at no time since July, 1944, has she formed any intention to resume married life."

After considering the authorities bearing on the question whether sexual intercourse between spouses during the period of three years immediately preceding the presentation by one of them of a petition for divorce based on desertion under s. 1 (1) (b) of the Matrimonial Causes Act, 1950, precludes the granting of a decree on that ground, the learned commissioner regarded himself as bound, by what was said in the House of Lords in *Henderson v. Henderson & Crellin* (1) as to the irrevocable effect of condonation by intercourse on the husband's part, and having regard also to the reasoning of the Divisional Court in *Viney v. Viney* (2) and the disapproval therein expressed of *Whitney v. Whitney* (3), where a husband was granted a decree notwithstanding intercourse with the deserting wife within the three years period, to dismiss the petition, which he accordingly did.

From that decision the husband now appeals, and the questions to be considered are substantially: (i) whether the mere fact of sexual intercourse between a deserted and a deserting spouse, without anything more towards the resumption of cohabitation in the full sense, is consistent with the continuance of the state of desertion, and, therefore, does not preclude the granting to the deserted party of a decree based on three years' desertion on a petition presented within three years after such intercourse (a) if the deserted party is the husband, and (b) if the deserted party is the wife; and (ii) whether the doctrine of condonation or some analogous principle applies to the matrimonial offence of desertion as defined in s. 1 (1) (b) of the Matrimonial Causes Act, 1950, so as to make sexual intercourse between spouses within the three years period an absolute bar to a decree founded on desertion for that period, at all events where the deserted party is the husband.

Apart from authority, I, speaking for myself, would have been disposed to regard sexual intercourse between a deserted and a deserting spouse as in itself essentially inconsistent with the continuance of the state of desertion between them, and thus interrupting the statutory period of desertion whether the deserted party was the husband or the wife. There is, to my mind, an element of repugnancy in the conception of a husband and wife, while in the act of having sexual intercourse with each other as husband and wife, being, nevertheless, in a state of desertion. It is well settled that cohabitation without actual sexual intercourse may condone adultery, whereas sexual intercourse with knowledge of the facts does in itself inevitably condone it, at all events where the husband is the injured party, even if there is nothing more in the way of resumption of cohabitation in the full sense. It seems to me, *prima facie*, unreasonable that an act which is accorded such a decisive effect as an affirmation by the injured

(1) [1944] 1 All E.R. 44; [1944] A.C. 49.

(2) 115 J.P. 397; [1951] 2 All E.R. 204; [1951] P. 457.

(3) 115 J.P. 71; [1951] 1 All E.R. 301; [1951] P. 250.

party of the married state for the purposes of condonation should be able to take place consistently with the uninterrupted continuance of a state of desertion, which while it continues amounts to a negation of the married state. Suppose the case of a wife who is in desertion and has committed adultery. With knowledge of the adultery the husband seeks her out and has intercourse with her. This is decisive as a condonation of, and affirmation of, the marriage, notwithstanding the adultery. The husband, by his conduct, has taken his wife back as his wife, adulteress though she has been. How can it consistently be said that, although he has taken her back and reinstated her as his wife, she has not come back to him, but has been continuously, even during the decisive act of intercourse, in a state of desertion from him?

This illustration, at all events where the husband is the deserted party, reinforces the conclusion to which, apart from authority, I would, speaking for myself, be disposed to come—that sexual intercourse between a deserted and a deserting spouse, even when unaccompanied by resumption of cohabitation in other respects, puts an end to or interrupts the period of desertion. In other words, I would, speaking for myself, be inclined, apart from authority, to hold that while desertion is terminated by resumption of cohabitation in the full sense it does not follow that desertion can only be terminated by such resumption, and that sexual intercourse in itself, irrespective of any resumption of cohabitation in other respects, does suffice to terminate it, as being essentially inconsistent with the continuance of a state of desertion. I would add that my inclination so to hold would be stronger in the case of a deserted husband than in the case of a deserted wife by reason of the more cogent application to the case of a deserted husband of the comparison I have sought to draw with the effect of sexual intercourse for the purposes of condonation.

The question is, however, by no means free from authority, and we have been referred to a large number of cases, including several from the United States of America and Australia, bearing directly or indirectly on it. I do not propose to embark on any protracted review of all these decisions, as reference to only a few of them will suffice to indicate the course which, in my judgment, this court is bound by authority to take. I will begin with *Rowell v. Rowell* (1) where it was held by this court that the fact that intercourse had taken place between spouses living apart under a deed of separation was not of itself conclusive evidence that the separation had come to an end so as to make the deed of no effect, or in particular so as to put an end to the husband's obligation under the deed to pay a weekly sum to the wife during their joint lives if they should so long live separate from one another. Although that case was concerned with a contractual separation under a deed, and not with desertion, and the question, therefore, was whether, by reason of the mere fact of sexual intercourse, unaccompanied by any resumption of cohabitation in other respects, the parties had ceased to "live separate and apart from each other" within the meaning of the deed, there is no doubt that it has been regarded as authority for the proposition that sexual intercourse between a deserted and a deserting spouse does not of itself put an end to desertion.

In *Mummery v. Mummery* (2) LORD MERRIMAN, P., founding himself to a great extent on *Rowell v. Rowell* (1), held that a single act of intercourse between a deserted wife and a deserting husband consented to by the wife in the hope of effecting a reconciliation with the husband, who for his part never intended to live with her again, and, in fact, left her the next morning and never returned,

(1) [1900] 1 Q.B. 9.

(2) [1942] 1 All E.R. 553; [1942] P. 107.

did not operate as a condonation of the desertion prior to the act of intercourse or break the continuous desertion for upwards of three years immediately preceding the presentation of the wife's petition. LORD MERRIMAN, P., said ([1942] 1 All E.R. 555):

"... a resumption of cohabitation in the full sense of the word puts an end to a state of desertion, and that not merely because it condones the previous desertion for whatever time that offence has lasted, but also because a resumption of cohabitation is the exact negation of a state of desertion. The two things cannot exist together. In this case, of course, it is completely clear that, apart from whatever may be the legal effect of what happened on that particular night, the husband had not the slightest intention of resuming cohabitation in the ordinary sense of the word. On any view of the matter, even assuming that I am bound to hold that cohabitation was resumed or that the offence had been condoned on that occasion, it is plain that the husband resumed a state of desertion again the next day. I think ... that the question for decision is whether or not the fact that they spent the night together, and for that night resumed marital relations in the usual sense, is conclusive evidence of the fact that there had been a resumption of cohabitation so as to condone the previous desertion and bring the state of desertion to an end. If the fact that sexual intercourse has taken place between the parties is conclusive, there is nothing more to be said about it. The wife does not suggest ... that her consent to that act was obtained by fraud, so that the issue raised in *Roberts v. Roberts & Temple* (1) does not arise. It seems to me that the whole question turns on what cohabitation means, and what a resumption of cohabitation means. Now, LORD MERRIVALE said more than once that no judge has ever attempted a comprehensive definition of desertion and that no judge would ever succeed in doing so. Amongst the descriptions of desertion which he gave was one which has always appealed to me. He said that desertion was a withdrawal, not from a place, but from a state of things (*Pulford v. Pulford* (2) ([1923] P. 21)). Similarly, I doubt whether any judge could give a completely exhaustive definition of cohabitation, and certainly I am not going to attempt to do so. At least a resumption of cohabitation must mean resuming a state of things—that is to say, setting up a matrimonial home together. That involves, so it seems to me, a bilateral intention on the part of both spouses so to do. The question, then, is: Does coming together for a single night raise an irrebuttable presumption that the parties have resumed cohabitation even for that short time? Put in another way, does it raise an irrebuttable presumption that the wife, in consenting to that state of things, has condoned the previous desertion? ... I think that it would lead to an absurd state of things if one were bound to hold that that is so."

After describing as "praiseworthy" every legitimate attempt by a wife to regain her husband's affection and pointing out that the mere occurrence of meetings arranged with a view to effecting a reconciliation obviously would not compel the court to hold that the state of desertion was brought to an end, LORD MERRIMAN, P., continued (*ibid.*):

"Why, then, should a wife who goes a step further in the hope of effecting a reconciliation, and allows her husband to sleep the night with her, be held to have condoned the offence and to have resumed cohabitation when it is clear, beyond the slightest shadow of doubt, that the husband

(1) (1917), 117 L.T. 157.

(2) [1923] P. 18.

at the same time had no intention . . . of resuming cohabitation? I do not think that I am obliged so to hold. I think the law is that, as regards the wife at any rate, an act of sexual intercourse is not conclusive on the question of condonation; and that it does not raise an irrebuttable presumption that cohabitation has been resumed. I think I am justified in holding, if not obliged so to hold, on the authority of *Rowell v. Rowell* (1)."

The President then proceeded to cite at some length from the judgments in that case and expressed his conclusion thus (*ibid.*, 556):

" . . . I think that I am justified in holding here that there has been neither condonation nor a resumption of cohabitation which interrupts this period of desertion, and that the wife is entitled to her decree."

The judgment in *Mummary v. Mummary* (2) received the unqualified approval of this court in *Bartram v. Bartram* (3), and must, therefore, be regarded as an authority binding on us, and it seems to me to establish the proposition that in order to terminate or interrupt the state of desertion between a deserted and a deserting spouse there must be a resumption of cohabitation, that is to say, the setting up of a matrimonial home together pursuant to a "bilateral", which I take to mean a "common" or "mutual", intention to do so. Indeed, in *Bartram v. Bartram* (3), DENNING, L.J., went further and said (113 J.P. 425):

" . . . I would say in such a case the period of desertion does not cease to run unless, and until, a true reconciliation has been effected . . . Any other view would greatly hamper attempts at reconciliation, because it would mean that the deserted party would be disinclined to take the other back for fear of losing his legal rights in case the reconciliation was unsuccessful."

It seems to me necessarily to follow that mere acts of sexual intercourse between a deserted and a deserting spouse, not accompanied by any setting up of a matrimonial home together or by any intention on the part of the deserting spouse to do so, do not terminate or interrupt the state of desertion.

In *Mummary v. Mummary* (2) LORD MERRIMAN, P., was careful to preserve the possible distinction between the case of a deserted wife (which was then before him) and the case of a deserted husband, having in mind, no doubt, the question of condonation (to which I will return) and the much greater weight attributable to sexual intercourse as condonation by a husband than as condonation by a wife. For my part, if I have rightly stated the ratio decidendi in *Mummary v. Mummary* (2) as expressly approved in *Bartram v. Bartram* (3), it seems to me, setting aside for the moment the question of condonation, to leave no room for any such distinction. If what is indispensably necessary to end or interrupt desertion is the resumption of cohabitation in the sense of the setting up of a matrimonial home together accompanied by a common intention on the part of both spouses to do so, then mere sexual intercourse between a deserted and a deserting spouse unaccompanied by any such setting up, or common intention to do so, cannot end or interrupt the state of desertion, whether the deserter is the husband or the wife, and whether or not the intercourse leads (as in the present case) to the birth of a child.

In *Whitney v. Whitney* (4) WILLMER, J., following *Bartram v. Bartram* (3) and *Mummary v. Mummary* (2), held a husband entitled to a decree on the ground of desertion by his wife for the statutory period of three years notwithstanding sexual intercourse with his wife on some half dozen occasions during

(1) [1900] 1 Q.B. 9.

(2) [1942] 1 All E.R. 553; [1942] P. 107.

(3) 113 J.P. 422; [1949] 2 All E.R. 270; [1950] P. 1.

(4) 115 J.P. 71; [1951] 1 All E.R. 301; [1951] P. 250.

that period, the intercourse having taken place on week-end visits made by the husband to the wife in attempts to effect a reconciliation, and the wife on her part never having had any intention of setting up a matrimonial home, but having on the contrary since her initial act of desertion maintained her determination to live separate and apart from her husband. Subject to what I will say below on the question of condonation, I think that on the authorities *WILLMER, J.*, was right in so holding. In *Viney v. Viney* (1), however, a Divisional Court, consisting of LORD MERRIMAN, P., and HAVERS, J., disapproved *Whitney v. Whitney* (2) on the ground that the husband in that case must be taken to have condoned the desertion, and referred at some length to the re-statement of the doctrine of condonation and the conclusive effect for that purpose of sexual intercourse on the part of an injured husband contained in the speech of VISCOUNT SIMON, L.C., in *Henderson v. Henderson & Crellin* (3). Both *Henderson v. Henderson & Crellin* (3) and *Viney v. Viney* (1) were cases of adultery, the application to which of the doctrine of condonation in the strict sense is undoubted. The same can, in my view, however, by no means be said in relation to desertion of the kind here in question, that is, the continuing and, so to speak, ambulatory offence of desertion for a period of at least three years immediately preceding the presentation of the petition, which can never become complete until the petition is actually presented, as distinct from, for example, the desertion by a husband for a period of two years (completed at any time) which under s. 27 of the Matrimonial Causes Act, 1857, in conjunction with the husband's adultery entitled the wife to a divorce, and which, as appears from *Blandford v. Blandford* (4), could be the subject of condonation and revival. Clearly, unless the doctrine of condonation or some analogous principle is applicable to the new statutory offence of desertion for the period of three years immediately preceding the presentation of the petition, the strictures passed in *Viney v. Viney* (1) on the decision in *Whitney v. Whitney* (2) are not well founded.

This brings me to the consideration of the second of the two questions stated earlier in this judgment, that is, whether the doctrine of condonation or some analogous principle does apply to desertion as defined in s. 1 (1) (b) of the Matrimonial Causes Act, 1950. Counsel for the Queen's Proctor, who on the first question supported in argument substantially the view above expressed as the view I would myself, apart from authority, have been disposed to prefer, did not contend as regards the second question that the doctrine of condonation in the strict sense applies to desertion as defined in s. 1 (1) (b), and, in my view, the difficulties in the way of so applying it are really insuperable.

I will not attempt to add any definition of my own to the various statements of the doctrine of condonation to be found in the authorities; but I think it may, at all events, be said that condonation properly so called does, at all events, involve (i) an election by the injured spouse to affirm the marriage notwithstanding the condoned offence, and (ii) the possibility of revival of the condoned offence by any further matrimonial offence on the part of the guilty spouse. Now, it is the essence of the offence of desertion that the deserted spouse should all the time be affirming the marriage; otherwise desertion ceases and becomes (in effect) separation by consent. There is thus no question of election on the part of the deserted spouse to affirm or disaffirm it. He or she has no option but to affirm. Further, the offence of desertion for a period of three years immediately preceding

(1) 115 J.P. 397; [1951] 2 All E.R. 204; [1951] P. 457.

(2) 115 J.P. 71; [1951] 1 All E.R. 301; [1951] P. 250.

(3) [1944] 1 All E.R. 44; [1944] A.C. 49.

(4) (1883), 8 P.D. 19.

the presentation of the petition, once condoned, could never be revived, because the continuous period of desertion required by the statute would be irretrievably broken. For these reasons it seems to me that the doctrine of condonation in its strict sense is inappropriate and inapplicable to the offence of desertion as defined in s. 1 (1) (b) of the Act of 1950.

Counsel for the Queen's Proctor did, however, submit, and I was attracted by the submission, that by analogy to the doctrine of condonation in the strict sense a deserted spouse, or at all events a deserted husband, who chooses to have sexual intercourse with the deserter must be treated as having conclusively affirmed the marriage and waived or remitted the deserting spouse's desertion for any period preceding the act of intercourse. In the end I find myself forced to the conclusion that this view cannot stand consistently with the ratio decidendi in *Mummery v. Mummery* (1) as approved in *Bartram v. Bartram* (2). If sexual intercourse without resumption of cohabitation in other respects does not put an end to or interrupt the state of desertion, then the state of desertion and the offence of the deserting party continues notwithstanding the intercourse, and there is no room for the application of the doctrine of condonation or any analogous principle. To apply it would be as much as to say either that the state of desertion can be brought to an end and can be interrupted by sexual intercourse alone without any setting up by the spouses of a matrimonial home together and without any mutual or common or bilateral intention to do so (which the ratio decidendi in *Mummery v. Mummery* (1), as approved in *Bartram v. Bartram* (2), in my view, forbids), or else that the offence of desertion can be condoned, although it continues without a break before during and after the act relied on as constituting condonation, which seems to me impossible. Accordingly, in deference to the authorities rather than by my own inclination, I would allow this appeal.

HODSON, L.J.: The question of law which falls to be determined is whether a husband who has been deserted by his wife can succeed in a petition for divorce if during the three years before the petition he has had sexual connection with her. This question was answered in the negative by the learned commissioner, who, in doing so, followed the dicta of LORD MERRIMAN, P., and HAVERS, J., in *Viney v. Viney* (3) which disapproved a decision of WILLMER, J., in *Whitney v. Whitney* (4), where the same question was answered in the affirmative. The reasoning on which LORD MERRIMAN, P., founded himself is plain and logical. Desertion is a matrimonial offence. A husband who has sexual relations with his erring spouse with knowledge thereof cannot be heard to say that he has not condoned the offence: *Henderson v. Henderson & Crellin* (5). Therefore, desertion prior to sexual relations is manifestly condoned by a husband. This is so although in the case of a wife who has been deserted and submits to the embraces of her husband in an endeavour to secure his return, condonation will not inevitably be found against her if she seeks to rely on a period of desertion before as well as after such an event: see *Mummery v. Mummery* (1). This conclusion is permissible since the doctrine of condonation where a wife submits to her husband, he being the wrongdoer, operates in a different way from that in which it operates where the position is reversed and the wife is the wrongdoer: *Henderson v. Henderson & Crellin* (5).

(1) [1942] 1 All E.R. 553; [1942] P. 107.

(2) 113 J.P. 422; [1949] 2 All E.R. 270; [1950] P. 1.

(3) 115 J.P. 397; [1951] 2 All E.R. 204; [1951] P. 457.

(4) 115 J.P. 71; [1951] 1 All E.R. 301; [1951] P. 250.

(5) [1944] 1 All E.R. 44; [1944] A.C. 49.

Counsel for the Queen's Proctor has contended for a negative answer to the question, but he has not put the case in the same way. He admits that the doctrine of condonation does not apply except by analogy to what may be called a current period of desertion as opposed to a period which of itself provides a complete cause of action. He contends that the act of voluntary sexual intercourse is, however, conclusive evidence of a termination of desertion, and that neither party can be heard to say after such an act that cohabitation has not been resumed. Accordingly, he says *Mummery v. Mummery* (1) was wrongly decided because once the sexual act is proved the factum of separation has gone. He contends that the act cannot be referable to anything else but living together as husband and wife. In my judgment, the argument, although it has considerable force, is not consistent with authority. It is now, I think, too late to say that acts of intercourse per se operate to terminate desertion.

Assistance is, I think, derived from *Rowell v. Rowell* (2), a decision of this court upon the construction of a deed of separation expressed to operate during the joint lives of the parties "if they should so long live separate from each other". The question there was whether the deed ceased to operate because the sexual act had taken place; in other words, must the parties be held to have ceased to live separate from each other because this event had occurred? The question was answered in the negative. In my opinion, this involves a conclusion that the parties had not ceased to live apart, which is the same thing as had not "resumed cohabitation", to use the formal language employed by the legislature in the Summary Jurisdiction Acts. I conceive that the result of this case would have been the same whichever spouse was setting up the deed. This case was followed by LORD MERRIMAN, P., in *Mummery v. Mummery* (1), which was a desertion case. The last decision has been regularly followed and expressly affirmed by the Court of Appeal in *Bartram v. Bartram* (3). In the latter case the particular point was not in question, but the significance of the acts of intercourse can hardly have been overlooked by the members of the court. In any event I would respectfully accept the decision of LORD MERRIMAN, P., in *Mummery v. Mummery* (1) and the reasoning on which it is based with one qualification. In *Mummery v. Mummery* (1) the President expressly reserved the point now in question by using the words "as regards the wife at any rate", thus showing plainly that he had in mind the impact of the doctrine of condonation on sexual intercourse by a husband with an erring wife.

This brings me to consider the question whether the court is bound to hold that the husband is precluded by his act of having had sexual relations with his wife from relying on desertion preceding that act because he has thereby condoned her desertion. In the first place there is no authority binding on this court to this effect. The actual decision of the Divisional Court in *Viney v. Viney* (4) is not open to criticism since the offence there under consideration was adultery, so that condonation of adultery only was directly in question. The observations on the question now before the court were obiter dicta. Cases under the old law such as *Blandford v. Blandford* (5), and *Paine v. Paine* (6), where condonation was applied to completed desertion giving rise in each case to a cause of action, are not directly in point. The same may be said of *Maslin v. Maslin* (7), a recent decision of HAVERS, J., where, intercourse having taken

(1) [1942] 1 All E.R. 553; [1942] P. 107.

(2) [1900] 1 Q.B. 9.

(3) 113 J.P. 422; [1949] 2 All E.R. 270; [1950] P. 1.

(4) 115 J.P. 397; [1951] 2 All E.R. 204; [1951] P. 457.

(5) (1883), 8 P.D. 19.

(6) [1903] P. 263.

(7) 16 J.P. 136; [1952] 1 All E.R. 477.

place after a petition based on desertion had been presented by the husband, the petition was dismissed. The absence of any reference to condonation in the section of the Matrimonial Causes Act, 1950, dealing with divorce for desertion is of significance but not conclusive, particularly as sodomy, which is also omitted from the offences barred by condonation, is held to be in the same position as adultery: *Statham v. Statham* (1), per GREER, L.J. ([1929] P. 145).

I think the key to the problem is to be found in an examination of what is meant by condonation in the legal sense. Since offences condoned are capable of revival condonation is not equivalent to forgiveness in the theological sense. It may be said that it implies merely that the legal remedy for the time being is waived: see *Beeby v. Beeby* (2) where LORD STOWELL said (1 Hag. Ecc. 793 and 797):

"Now condonation is forgiveness legally releasing the injury . . . In general it is a good plea in bar; it is not fit that a man should sue for a debt which he has released . . ."

Nevertheless, there is always an element of true forgiveness: see *Henderson v. Henderson & Crellin* (3) per VISCOUNT SIMON, L.C. This element involves, in my judgment, the factor of choice. The husband must be held to have made such a choice when he has sexual relations with his wife after his right of action against her has accrued. On the other hand, the choice whether to forgive or not is not open during a current period of desertion to the deserted spouse who is asked to receive back his erring partner. Whether he forgives her or not he must take her back and thereafter her desertion is at an end. If he will not receive her, he becomes himself a deserter. He cannot say: "You have deserted me. I will not forgive you for running away, and, therefore, you cannot return". During the whole of the current period he must affirm the marriage. In the case of a completed period of desertion, now only after the presentation of a petition, in the case of adultery and in that of cruelty, he can disaffirm the marriage as soon as the offence is committed.

Accordingly, in my opinion, as I ventured to suggest in *Lane v. Lane* (4), when considering a current period of desertion the primary question is: Aye or No, "is it terminated?"—not "is it condoned?" It can be terminated by a resumption of cohabitation involving a mutual or, as it has been called, a bilateral act, or it can be terminated by the deserter returning or even offering to return provided the offer is not one which for some reason the offeree is entitled to refuse, but it is not necessarily terminated as a matter of law by the sexual act. So to hold would, in my judgment, put difficulties in the way of attempted reconciliations, which would be regrettable, and for that reason I think it would be against the public interest if one were driven to such a conclusion. I am glad not to be so driven. At the same time the facts in each case must be carefully considered because if it be found that there has really been a mutual coming together for however short a time it is clear that in such a case desertion has been terminated. The case under consideration is in itself on its own facts not free from difficulty, but I have come to the conclusion that on the facts as found there was no mutuality, and the appeal should be allowed. *Appeal allowed.*

Solicitors: *Kinch & Richardson*, agents for *Percy Hughes & Roberts*, Birkenhead (for the husband); *Treasury Solicitor* (for the Queen's Proctor).

F.G.

(1) [1929] P. 131.

(2) (1799), 1 Hag. Ecc. 789.

(3) [1944] 1 All E.R. 44; [1944] A.C. 49.

(4) [1952] 1 All E.R. 223; [1952] P. 34.

Decision of COURT OF APPEAL (115 J.P. 265), reversed.

HOUSE OF LORDS

(LORD PORTER, LORD OAKSEY, LORD MORTON OF HENRYTON, LORD REID AND LORD COHEN)

Mar. 3, 4, Apr. 24, 1952

JOHN LEWIS & CO., LTD. v. TIMS

False Imprisonment—Arrest without warrant—Person arrested to be taken before justice or police officer as soon as reasonably possible—Right of detention for purpose of investigation.

The respondent and her daughter entered the appellants' shop where the daughter stole certain articles. They then left the shop and the daughter placed the stolen articles in a bag carried by the respondent. Two detectives employed by the appellants followed the two women outside the shop and saw them go into another shop where the daughter again stole an article and placed it in the respondent's bag. As they came out into the street one of the two detectives accosted them, said they had stolen the articles, and asked them to come with her. It was a regulation of the appellants that only a managing director or a general manager of the appellants was authorised to institute any prosecution. The respondent and her daughter were taken back to the appellants' shop and detained until the chief store detective and the managing director heard the account of the two detectives, after which the police were sent for and the respondent and her daughter were taken to the police station, charged, and released on bail. Next morning the daughter was tried and convicted, but the charge against the respondent was withdrawn by consent of the court as the appellants were advised that there was insufficient evidence to justify a prosecution. On a claim by the respondent for damages for false imprisonment,

HELD: where a person in exercise of his common law right arrested a person without warrant, he should take the arrested person before a justice of the peace or a police officer, not necessarily forthwith, but as soon as was reasonably possible; in the circumstances the taking of the respondent to the appellants' office to obtain authority to prosecute was not an unreasonable delay before handing her over to the police; and, therefore, the appellants were not liable for false imprisonment.

Decision of COURT OF APPEAL (115 J.P. 265) reversed.

APPEAL by the appellants from an order of the Court of Appeal (LORD GODDARD, C.J., ASQUITH and BIRKETT, L.JJ.), dated Mar. 14, 1951, and reported 115 J.P. 265, affirming in part an order of DONOVAN, J., dated Nov. 24, 1950, and made in an action for malicious prosecution and false imprisonment in which the jury awarded the respondent, the plaintiff in the action, £176 5s. damages.

The Court of Appeal allowed the appellants' appeal on the issue of malicious prosecution, but decided against them on the issue of false imprisonment, holding that, in taking the respondent into their office and detaining her there while inquiries as to the circumstances of her arrest were being made, they had not fulfilled the requirements of the law that a person arrested without warrant should be taken forthwith before a justice of the peace or a police officer. From the latter decision the appellants appealed, contending that their duty was to act reasonably for the purpose of bringing the respondent to justice within a reasonable time.

Melford Stevenson, Q.C., Wilson, Q.C., Blomefield and A. W. Hamilton for the appellants.

The respondent did not appear.

The House took time for consideration.

April 24. The following opinions were read.

LORD PORTER: My Lords, the problem raised in this matter requires a determination by your Lordships' House of the principles on which, and the circumstances in which, the arrest of those suspected of felony can be justified in a case where no warrant has been issued, and it affects, I think, both the obligations of the police and those of private persons. The solution must, therefore, lead to a careful inquiry which is not rendered the less anxious by the fact that the appellants alone were represented in the argument before your Lordships or the fact that the sum at stake is a small one. When the liberty of the subject is at stake questions as to the damage sustained become of little importance.

The appeal is from an order of the Court of Appeal of Mar. 14, 1951, in so far as it affirms the judgment of DONOVAN, J. on an issue as to false imprisonment. The circumstances in which the claim arises are undisputed.

The respondent, Mrs. Tims, and her daughter visited the calendar department of the appellants' store in Oxford Street in the afternoon of Dec. 16, 1948, and while they were there Miss Tims was seen by a Miss Wheeler, one of the appellants' private detectives, to steal four calendars. As the respondent and Miss Tims were leaving the premises another private detective joined Miss Wheeler and the two together followed the mother and daughter along Oxford Street to Messrs. Littlewoods' store about three or four hundred yards distant. On the way Miss Tims transferred the four calendars to a paper bag which her mother was carrying. At Littlewoods Miss Tims stole a table cloth, and this too she placed in her mother's bag before leaving the store. When the respondent and Miss Tims had come out into the street again one of the two detectives accosted them, said they had stolen the calendars, and asked them to come with her.

The evidence established that the accusation of theft was made in the presence of both the accused and, though the mother is deaf, sufficiently loudly to give her some idea of the charge which was being made. This was the conclusion reached by the Court of Appeal. The respondent, on the other hand, maintained that she had not been informed at first why she was being taken back to the appellants' premises, and the jury accepted her evidence. Her contention, accordingly, was that she had been arrested without being told what her alleged crime was and that, therefore, under the decision in *Christie v. Leachinsky* (1), the arrest was wrongful. It is plain, however, that she knew exactly what the charge was by the time the party had returned to the appellants' store. Indeed, the jury have found that one of the detectives then said: "Where is the stolen stuff?" The learned judge, however, as a result of the jury's answers to two questions put by him, held the appellants liable on the issue of false imprisonment on the ground that the respondent was not informed at the first opportunity that she was accused of stealing. On the other hand, it is clear from the daughter's evidence that the accusation of stealing was made in her presence and that of her mother. I quote from her cross-examination:

"Q.—Whatever was said, this is quite clear, is it not, that it was said in the presence and hearing of both you and your mother? A.—Yes. Q.—And whatever was said it was made quite clear that you were being accused of stealing? A.—As I have already said."

That testimony makes it apparent that the crime for which the arrest was made was plainly referred to. The respondent, it is true, denied all knowledge of the accusation until later, but she was deaf and there is nothing to indicate

(1) 111 J.P. 224; [1947] 1 All E.R. 567; [1947] A.C. 573.

that the detectives had any reason to suspect that she could not hear what was said. They cannot, therefore, be at fault if the respondent did not hear. In my opinion, the decision in *Christie v. Leachinsky* (1) has no bearing on such a case. I make these observations lest it should be thought that full consideration had not been given in your Lordships' House to the argument which prevailed before DONOVAN, J., but, indeed, this aspect of the case is only a matter for consideration inasmuch as, if the respondent had taken part in the argument before your Lordships, she might have defended DONOVAN, J.'s decision in her favour on that ground.

After making the charge the two detectives took the respondent and her daughter back to the office of the chief store detective in the appellants' store and they were detained there against their will until the chief detective, a Miss Pearce, and a managing director had been summoned to the office and an account had been given to them of what the detectives had observed. Miss Tims, undoubtedly, protested that her mother was some ten to fifteen feet distant from her when the calendars were taken, and the jury have so found, but equally it is clear that the calendars were at a later time placed in the mother's bag, were present in it when the arrest was made, and were found in it at the chief detective's office.

Some difference appears to exist as to the length of time during which the two women were detained at the chief detective's office. Miss Tims said it was not less than an hour, and the jury, in answer to a question put to them in the form: "Was the plaintiff detained in John Lewis's against her will for an hour or so before the police were summoned?", replied "Yes". The exact length of the detention is, in my view, immaterial in the circumstances of this case, but the estimate of an hour or so is, in my view, not established by the evidence. No doubt, it seemed a long time to Miss Tims, but her own evidence is that she and her mother were arrested some time between 3.30 p.m. and 4 p.m., the police evidence called for the respondent is that they were summoned at 4.10 p.m. and after going to the office and hearing the story and accompanying the accused to the station, they reached the station at 4.30 p.m. The length of detention would only be material if it had been alleged that the two women were detained beyond such time as was reasonable to acquaint a director or manager of the circumstances and obtain his instructions whether to prosecute or not. No such suggestion was made, no evidence was called to deal with the point, and the respondent is, therefore, precluded from relying on it now. I only mention it because there may be cases in which it could be contended that, though a reasonable amount of detention would be justified, the actual detention was unduly long. In such a case it would be the duty of the judge to determine whether there was or was not evidence from which it could be deduced that the detention was unduly long, and, if he held that there was, to leave the question to the jury whether, in fact, it was longer than was justified. As I have said, however, no such inquiry is called for in the present case.

The evidence establishes that Miss Tims protested that her mother was in no way concerned with the theft, but the respondent herself seems to have offered no explanation of the presence of the stolen articles in her bag either to the detectives or at the office or before the court though it is in evidence that she did say in the presence of a police constable: "I did not have anything to do with it". Her failure to do so is, of course, not material as in any way establishing her participation in the crime, but it is a reason for accepting the view that the appellants' representatives genuinely thought her guilty.

(1) 111 J.P. 224; [1947] 1 All E.R. 567; [1947] A.C. 573.

The sequence of events after the return to the chief detective's office is that first she and afterwards a managing director were sent for and informed of what had occurred, and that the police were then sent for and arrived shortly after 4.10 p.m. though they were not immediately available on the first summons. The two accused were then taken to the police station, charged and released on bail. Next morning they were brought before the magistrate. At that hearing the appellants were represented by a solicitor, and the respondent was unrepresented. Inasmuch as Mrs. Tims was not beside her daughter at the moment when the calendars were taken, the solicitor appears to have thought that a jury might acquit the mother and, therefore, the charge against her should not be persisted in. He accordingly asked for a remand. It was suggested that, as he thought a jury might not convict and then asked for a remand instead of withdrawing the charge at once, his action supported an allegation of malice with which the appellants would be infected and would, therefore, be liable as having instituted or at any rate persisted in a malicious prosecution. I see no reason for supposing that the solicitor thought that the respondent was not guilty though he may have thought that a jury might not convict. But in any case John Lewis & Co. are the persons sued, not their solicitor, and as LORD GODDARD, C.J., has pointed out, they never instigated him to continue the prosecution after he thought it might not succeed. His caution is no evidence of malice and no allegation of malice is made against the two detectives or any of the other representatives of the appellants.

There remains only the question, therefore, whether the appellants were rightly mulcted in damages for false imprisonment because their servants did not take the respondent immediately before a magistrate, but brought her back to a part of the appellants' premises. It was maintained on her behalf that, though an arrest might originally be justified, yet it became wrongful if the person accused was not taken forthwith before a justice of the peace. The appellants admitted that they could not retain her for an unreasonable time before handing her over to a constable or a jailor, or bringing her before a justice, but contended that their obligation was only to act within a reasonable time and that an immediate and direct journey to the magistrate's court was not required. Of the three courses which the respondents asserted were open to them commitment to prison may today be neglected. The accused would not be received nor would the prison be available. The choice lies between an immediate bringing before a magistrate or, possibly, handing over to a police officer, and the like course taken within a reasonable time. As I have said, if the latter is the true obligation and if the appellants' representatives were justified in bringing back the respondent to the appellants' premises to get the advice of a manager and to obtain, if he thought fit, his authority to prosecute, there is no ground for saying that the time taken was unreasonable. But it is said on behalf of the respondent that it is not enough for the arrester to bring the person whom he has arrested before a justice or the police within a reasonable time: he must be brought before them "immediately" or "forthwith". If not, the arrest is wrongful.

The Court of Appeal has found the appellants liable on this short ground and on this short ground only. Their view has been expressed by LORD GODDARD, C.J., in a passage of his judgment, which I venture to quote (115 J.P. 267):

"The law is that if a person, be he a constable or a private person, arrests without warrant, although the arrest may be perfectly justified on the ground that a felony has been committed, or, in the case of a police officer, that there is reasonable and probable cause for believing that the person arrested has committed the offence, it is the duty of the person arresting

forthwith to take the person arrested before a justice. That was the original law, but now I think—and this is the only respect in which I should be at all inclined to depart from the law which has been laid down for very many years—it is the duty to take the arrested person before a justice or to a police station, and before a police officer. I say that because, since the Summary Jurisdiction Act, 1879, as amended and extended by other Acts, a superintendent or inspector of police, or other officer of equal or superior rank, has power to grant bail where a person is brought to the police station having been arrested without a warrant. Obviously, the reason why the common law required that a person should forthwith be taken before a justice was because he was being imprisoned, in the sense that his liberty was being curtailed, and it was, therefore, for a justice at once to consider whether or not the case should be investigated there and then, as might have been done in the old days when he sat in his own justice room, or whether he should grant bail. Now that a police officer has statutory powers to grant bail, he will do so, except in cases of gravity or where for good reason he may think it would be unsafe. In an ordinary case of a crime of this sort a police officer is as equally efficacious for the protection of the subject as a justice, and for that reason the arrested person should be taken forthwith before a police officer."

The learned Chief Justice supported this view by the citation of three cases and added (*ibid.*, 269):

"... I am of the opinion that the taking of these two women to the defendants' store instead of direct to a police station or to a magistrate's court could not be justified, and, that, therefore, technically there was a false imprisonment of the plaintiff."

Before I analyse the cases and consider the history and principles which lie behind the problem presented to your Lordships, it is, I think, expedient to set out the grounds on which the appellants justify their action. It is undesirable, they say, that their detectives, who must of necessity be subordinate officials, should be entrusted with the final decision whether a prosecution should take place or not. Such a decision should only rest with a senior and responsible officer, and after he has heard any explanation which the accused person has to offer. Indeed, it is in the interest of the person arrested that, however conclusive the evidence should appear against him, he should have the opportunity of stating what he has to say and that, in a proper case, he should avoid the publicity of a public trial. The complaint here is not that the appellants acted unreasonably or harshly or detained the respondent for an unnecessarily long time, but only that it is the law and expedient in the interests of the public generally that the supposed criminal should be brought before the court as speedily as possible and afforded the opportunity of applying for, and being granted, bail. Bearing these considerations in mind I deal first with the three cases on which the Court of Appeal primarily relied.

The first is *Wright v. Court* (1), decided in 1825, where it was held that a constable arresting a man must take him before a justice to be examined as soon as he reasonably can and that detention for three days to enable a person whose goods had been stolen to collect and bring his witnesses was not justified. The judgment says (4 B. & C. 598):

"... it is the duty of a person arresting anyone on suspicion of felony to take him before a justice as soon as he reasonably can, and the law gives

(1) (1825), 4 B. & C. 596; 4 L.J.O.S.K.B. 17.

no authority even to a justice to detain a person suspected, but for a reasonable time till he may be examined."

A report of the same case in 4 L.J.O.S.K.B. 18 says the arrested man must be brought before the justice "within a reasonable time". For these propositions COMYNS DIGEST, 5th ed., vol. 4, pp. 471-2 is referred to. The first passage (H.4.) says:

"... a man may be imprisoned by warrant of law, for that is a lawful process: as, by a constable ex officio, who upon complaint of a felony may commit the offender to an house, gaol or stocks, till he can be brought before a justice of peace ... So, if a felony be committed, the offender may be apprehended by any private person."

A later passage (H.5) says:

"... the law gives no authority to a justice of peace to detain a person suspected, but for a reasonable time till he may be examined."

It will be observed that none of these passages uses the words "immediately" or "forthwith", though they leave open the question what is a reasonable time. Moreover, the three days' delay in that case was not for the purpose of bringing the man arrested before the justices, but of collecting evidence.

The second case was *Hall v. Booth* (1), decided in 1834. The headnote says:

"A person cannot apprehend another upon a suspicion of felony for the purpose of taking him to the place where the felony was committed in order to ascertain whether he was the thief."

But in those circumstances, the plaintiff was not arrested as a felon, but was taken to the place where the felony was committed to find out whether he had committed the crime or not. Accordingly, DENMAN, C.J., very naturally said (3 Nev. & M.K.B. 319):

"You may go to inquire, but you cannot take him."

In fact, however, the complaint appears to have been that no adequate grounds for suspicion had been set out in the plea, and leave to amend was given, a circumstance which seems only to be consistent with a complaint that the pleadings were not in order. No question as to the time allowable for taking an arrested man before a justice was raised. He was taken to a shop for the purpose of ascertaining if he was the thief and was not arrested as a felon.

The third case is *Morris v. Wise* (2), decided in 1860. The action was for false imprisonment and the plea not guilty by statute. The statute in question was (after amendment by the defendant of his plea) 7 & 8 Geo. IV, c. 29, and the charge was for stealing grass, a crime dealt with by s. 43 but not made a felony in case of the first offence. Apart from the Act, therefore, there would be no power of arrest. By s. 63, however, of the same Act a special power of arrest is given to any peace officer or to the owner of the property in question in respect of any person found committing any offence punishable either on indictment or on summary conviction "by virtue of this Act". This right, however, was subject in express words to the obligation that the offender should be immediately apprehended and forthwith taken before some neighbouring justice of the peace, and it will be observed that the power of arrest is only given to a limited type of individual and even then only if the offender is taken in the act. BYLES, J., who tried the case, pointed out that the plaintiff had not been taken straight to the magistrate, but had been taken to the defendant's house, and he left the question

(1) (1834), 3 Nev. & M.K.B. 316.

(2) (1860), 2 F. & F. 51.

to the jury to say what damages should be given for the taking of the plaintiff by an indirect route. Under this direction the jury awarded 40s. The decision, therefore, has no direct bearing on the obligations imposed by the common law and clearly does not limit the general power of arrest. It would be an odd result of the Act if in all cases of felony no one but a constable or the owner of stolen property could arrest and only then if the person arrested was taken in flagrante delicto. The fact is that the Act does not lessen the common law power of arrest, but, on the one hand, widens it so as to include non-felonious offences, and, on the other, limits the persons who are entitled to arrest, and subjects them to the obligation to arrest immediately and bring the person concerned before a magistrate forthwith. In my view, therefore, the cases do not of themselves bear out the proposition that an arrested man must be taken before a justice of the peace immediately.

My Lords, similar additional powers of arrest are given by the Larceny Acts, 1861, s. 103, and 1916, s. 41, and by many other Acts and are subject to similar restrictions. I do not need to discuss them further, since the same considerations apply to them as to 7 & 8 Geo. IV, c. 29. If, then, the three cases which have been cited are not authorities that an arrested person must be taken immediately before a magistrate, it is necessary to examine the practice which has obtained in this country both before and after the Acts and cases cited.

Where the right of arrest is given to a private person, it is obviously desirable that the arrested man should be entrusted to some official care as soon as possible, and statements to that effect are to be found in, I think, all the text-books old or new. But it does not appear that in earlier days it was essential that the accused man should be brought before a magistrate in order that he might be bailed. The practice is set out in *HAWKINS' PLEAS OF THE CROWN*, 8th ed. (1824), vol. 2, p. 174, s. 3:

"It seems to be agreed by all the old books, that wheresoever a constable, or private person, may justify the arresting another for a felony or treason, he may also justify the sending or bringing him to the common gaol; and that every private person has as much authority in cases of this kind as the sheriff or any other officer, and may justify such imprisonment by his own authority, but not by the command of another. But inasmuch as it is certain, that a person lawfully making such an arrest may justify bringing the party to the constable, in order to be carried by him before a justice of peace, inasmuch as the statutes of 1 & 2 Phil. & Mar, c. 13. and 2 & 3 Phil. & Mar, c. 10. which direct in what manner persons brought before a justice of peace for felony shall be examined by him in order to their being committed or bailed, seem clearly to suppose, that all such persons are to be brought before such justice for such purpose; and inasmuch as the statute of 31 Car. 2 [c. 2] commonly called the Habeas Corpus Act, seems to suppose, that all persons who are committed to prison are there detained by virtue of some warrant in writing, which seems to be intended of a commitment by some magistrate, and the constant tenor of the late books, practice, and opinions, are agreeable hereto: it is certainly most advisable at this day, for any private person who arrests another for felony, to cause him to be brought, as soon as conveniently he may, before some justice of peace, that he may be committed or bailed by him."

To the like effect is *HALE'S PLEAS OF THE CROWN* (1800), vol. 2, p. 81, in which it is said of private persons using their powers of arrest:

"Now what is to be done by a private person, that thus arrests a party

upon suspicion of felony; if after such an arrest the party arresting discharges him without bringing him to a justice or constable, he shall be punished for the escape at the king's suit, but it makes not the imprisonment unlawful as to the party. 10 E. 4. 17. b. Or he may carry him to the gaol, and if the gaoler receives him, he that made the arrest is discharged, 10 E. 4. 18. a. but he must not carry him to a gaol of any other county than where he is taken, unless either there be no gaol in the county, or that he cannot for the danger of rebels bring him to that gaol. 11 E. 4. 4. Or he may deliver him to the constable of the vill, and that is a sufficient discharge. 10 E. 4. 17. b. But the proper way is to bring him to a justice of peace, who may commit, or discharge, or bail him, as the case requires."

HAWKINS in his turn quotes from DALTON's COUNTY JUSTICE (1742) p. 408, where it is said:

"But in all these cases before, where a private man shall arrest another, he ought thereupon to commit the prisoner to the gaol or to carry and deliver him to some constable, or to some other officer, etc."

DALTON himself refers to FINCH's COMMON LAWS OF ENGLAND. The first English edition (1759) says, at p. 368:

"Every one who suspects another of a felony . . . may arrest him; so that thereupon he commit him to gaol."

To the same effect is SHEPPARD'S ABRIDGEMENT (1675), vol. 2, p. 302, where, dealing with the right of a private person to arrest, he ends:

"he may of his own head, without any warrant from a justice of the peace, or officer, apprehend the felon, and carry him to a justice of the peace, or other officer, or to prison."

Finally, in BURNS' JUSTICE OF THE PEACE, the authority of which has been recognised in your Lordships' House in *Christie v. Leachinsky* (1), it is stated—I quote from the 30th ed. (1869), vol. 1, p. 305:

"When a private person has apprehended another for treason or felony, he should deliver him over to a constable, or carry him before a magistrate or to any gaol in the county. It is rarely the case that a private person carries the party to gaol. He cannot apprehend or discharge the party at his own pleasure . . . Neither can he, it seems, apprehend and deliver the party over to a constable only, but he must follow up the charge by attending before the magistrate, and then only he ceases to be an actor."

One may, perhaps, add the authority of *Cokayne v. Manyngham* (2), reported in vol. 47 of the Selden Society publications at p. 157, in which the court held that

"if a man arrest another for felony and deliver him to the constable that then he is loyally discharged even if the constable has let the prisoner go at large and has not led him to the gaol."

My Lords, I quote these authorities not for the purpose of suggesting that the obligation to bring an arrested person before a magistrate within a reasonable time has been lessened or abolished or of putting forward a contention that the duty may be laxly discharged, but in order to establish that the obligation is not in terms to proceed before the magistrate forthwith or immediately as certain special Acts require. The object of bringing a man arrested before a magistrate is not, as I view it, to ensure that the accused man may be bailed at once. The

(1) 111 J.P. 224; [1947] 1 All E.R. 567; [1947] A.C. 573.

(2) (1470), 47 Selden Society 156.

right to give bail in the case of anyone other than a justice of the peace did not exist before the Summary Jurisdiction Act, 1879, and even then the provisions of s. 38 only gave the right to grant bail to police officers if it was not practicable to bring the alleged offender before a court of summary jurisdiction as soon as practicable after he is taken into custody. Nor has the enlargement of those powers by later Acts effected any alteration in the length of the time given to bring the arrested man before a magistrate. Indeed, under the earlier procedure the individual who arrested was given the choice of three alternatives—gaol, the constable, or the justice. Today the gaol would not receive the prisoner, and I think that BURNS' requirement is right—a handing over to a constable is not enough; the arrester is not free of his obligation until he has proceeded before a magistrate. Nevertheless, the mere fact that the handing over to a constable is one of the methods prescribed for ridding oneself of the prisoner indicates a less stringent obligation than to proceed before the justice forthwith.

The two methods of approach are, perhaps, best seen by comparing the statement contained in the article on CRIMINAL LAW in HALSBURY'S LAWS OF ENGLAND (Hailsham ed.), vol. 9—a subject which was entrusted to the late AVORY, J. At p. 96, para. 122, it is said:

"A private person who arrests another under a common law power can only detain him for a reasonable time, and must then either set him free or hand him over to a constable or take him before a justice of the peace. If the suspected offender is not liberated and is not taken before a justice with reasonable expedition and by a direct road, the person who arrests is liable to an action of trespass."

For the latter statement *Wright v. Court* (1) is referred to, but that case merely speaks of "a reasonable time". Whether the time taken falls within that requirement is a matter of fact. No doubt, the route taken is one matter for consideration, but in the present case the learned judge who tried the case did not consider the time too long or the route adopted and the delay in proceeding to the appellants' office unreasonable. As against this statement of the law may be contrasted that contained in CLERK & LINDSELL ON THE LAW OF TORTS, 10th ed., p. 308, where it is said:

"The statutes authorising arrests without warrant generally provide that the arrested party shall be taken immediately or forthwith before a justice of the peace, but these provisions are only declaratory of the common law. So jealous is the law on this point that if the prisoner be conducted by a circuitous instead of the ordinary direct road he may recover for a false imprisonment."

For this statement *Morris v. Wise* (2) is quoted. That case, however, as is pointed out above, was not one of arrest under the common law, and I see no reason for assuming that statutes which enlarge the power of arrest so as to include misdemeanours, but limit the persons to whom the power of arrest is granted, are merely declaratory of the common law right or that the same principles apply to both classes.

What the common law requires is that, if a man be arrested on suspicion of felony, he should be taken before a tribunal which can deal with his case expeditiously. The question throughout should be: Has the arrester brought the arrested person to a place where his alleged offence can be dealt with as speedily as is reasonably possible? But all the circumstances in the case must be taken into consideration in deciding whether this requirement is complied with.

(1) (1825), 4 B. & C. 596; 4 L.J.O.S.K.B. 17.

(2) (1860), 2 F. & F. 51.

A direct route and a rapid progress are, no doubt, matters for consideration, but they are not the only matters. Those who arrest must be persuaded of the guilt of the accused; they cannot bolster up their assurance or the strength of the case by seeking further evidence and detaining the man arrested meanwhile or taking him to some spot where they can or may find further evidence. But there are advantages in refusing to give private detectives a free hand and leaving the determination of whether to prosecute or not to a superior official. Whether there is evidence that the steps taken were unreasonable or the delay too great is a matter for the judge. Whether, if there be such evidence, the delay was in fact too great is for the jury: see *Cave v. Mountain* (1). In the present case the complaint was, as I have said, not that the detention was too long, but that a direct route from the place of arrest to the magistrate's court had not been taken. In my opinion, that is not the vital question. Rather it is whether, in all the circumstances, the accused person has been brought before a justice of the peace within a reasonable time, it being always remembered that that time should be as short as is reasonably practicable. I would allow the appeal.

LORD OAKSEY: My Lords, I have had the advantage of reading the opinion of the noble and learned Lord on the Woolsack, and I agree with it.

LORD MORTON OF HENRYTON: My Lords, the question of law which arises on this appeal may be stated as follows:— When one person arrests another without a warrant in exercise of the common law power of arrest, is it the duty of the person making the arrest to take the arrested person before a justice or to a police station "forthwith", or is it the duty of the person making the arrest to take the arrested person before a justice or to a police station "as soon as he reasonably can"? The latter phrase is quoted from the judgment of the court in *Wright v. Court* (2):

The authorities on this subject have been fully discussed by my noble and learned friend on the Woolsack. I agree with his reasoning and with his conclusion, and I desire only to add a few words on the further question whether the two detectives took the respondent to the Marylebone Lane police station as soon as they reasonably could. In my opinion, they did. It was a regulation of the appellants that only a managing director or a general manager of the appellants was authorised to institute any prosecution against any person. This being so, it was, I think, reasonable for the detectives to take the respondent to the office at the appellants' premises for the purpose of getting authority for a prosecution. I cannot find any evidence that they went there for any other purpose. The case would have been a different one if they had gone there for the purpose of filling in gaps in the evidence: see *Hall v. Booth* (3) and *Morris v. Wise* (4). On reaching the office, the detectives explained what they had seen to the appellants' chief store detective and subsequently to Commander Newdegate, the managing director of the appellants' store in Oxford Street. As soon as Commander Newdegate had authorised the prosecution of the respondent and her daughter on a charge of theft, the police were sent for and they arrived a few minutes later from the Marylebone Lane police station. The substance of the facts was told to the police officers, and the respondent and her daughter were taken to the said police station.

My Lords, it does not appear that any point was taken either before DONOVAN, J., or in the Court of Appeal as to the length of time for which the respondent was

(1) (1840), 4 J.P. 572.

(2) (1825), 4 B. & C. 596; 4 L.J.O.S.K.B. 17.

(3) (1834), 3 Nev. & M.K.B. 316.

(4) (1860), 2 F. & F. 51.

detained at the office. The complaint was that she was taken there at all, instead of being taken direct to the police station. It is, I think, clear that DONOVAN, J., attached no importance to the length of the detention, for the first question which he put to the jury in regard to the alleged false imprisonment was:

"Was the plaintiff detained against her will in John Lewis's for an hour or so before the police were summoned?"

If the learned judge had attached any importance to the length of the detention, he would surely have divided this question into two parts—(i) Was the plaintiff detained against her will in John Lewis's? (ii) If so, for how long was she detained? Further, I think, it appears from the judgment of LORD GODDARD, C.J., that he regarded the respondent's case as being based on the fact that she was taken to the office, and not on the length of time during which she was detained there.

If the detectives acted reasonably, having regard to the regulation to which I have already referred, the further question must be considered whether the regulation was a reasonable one to impose on detectives whose duty it might be to arrest a suspected person. For if the regulation was such as to result in an unlawful infringement of the liberty of the subject, such infringement could not be excused on the ground that the detectives were merely carrying out the regulation. In my opinion, the regulation was a reasonable one. On this point I agree with the submissions of counsel for the appellants, which they summarised as follows:

"(A) It is undesirable that the power or duty to institute proceedings on behalf of corporations or other persons should be delegated to subordinate employees thereof or should be exercised by any but senior and responsible officers or representatives thereof. Since, in the case of suspected shop-lifting, it is not practicable to arrest a suspected person until he has left the premises without paying for goods which he has taken, it will not be practicable for a senior and responsible officer or representative to decide whether a charge should be made unless subordinate employees such as store detectives are entitled to take an arrested person back to the premises before he is handed over to the police.

"(B) It is in the interests of an arrested person himself that he should not be charged without being given an opportunity of offering any explanation or making any representation to a responsible officer or representative of the prospective prosecutors. It is to his own advantage that this opportunity should be given in the privacy of an office with the minimum possible number of persons present. This safeguard is especially important when the arrested person is very young or old or appears to be mentally unstable. In such cases it is in the public interest that a lenient and responsible discretion should be exercised before any charge is made."

I would allow the appeal.

LORD REID: My Lords, I concur.

LORD PORTER: My Lords, my noble and learned friend **LORD COHEN** asks me to say that he has had an opportunity of reading my opinion and he agrees with it.

Appeal allowed.

Solicitors: *Underwood & Co.* (for the appellants).

G.F.L.B.

COURT OF APPEAL

(SIR RAYMOND EVERSHERD, M.R., JENKINS AND MORRIS, L.JJ.)

Mar. 27, 31, Apr. 1, 1952

Re 42-48 PADDINGTON STREET & 62-72 CHILTERN STREET,
ST. MARYLEBONE.
MARKS & SPENCER, LTD., *v.* LONDON COUNTY COUNCIL
AND ANOTHER

Town and Country Planning—Unfinished buildings—“Works for the erection of a building”—Completion of clearance of site—Erection of new building not begun—Interim development—Conditional permission—Limitation of time for commencement and completion of work—No reason given for imposing condition—Validity of condition—Town and Country Planning Act, 1932 (22 and 23 Geo. 5, c. 48), s. 10 (3)—Town and Country Planning Act, 1947 (10 and 11 Geo. 6, c. 51), s. 78 (1).

In August, 1937, the plaintiffs entered into a building agreement with the P. estate which involved the plaintiffs in taking down a number of existing buildings and erecting a large edifice which was to be used for offices. The demolition of the existing buildings on the site had to be begun by mid-summer, 1938, and the erection of the new buildings completed by Christmas, 1939. These time limits were later extended. By August, 1948, all consents to the building scheme under the London Building Act, 1930, the Restriction of Ribbon Development Act, 1935, and the Town and Country Planning (General Interim Development) Order, 1933, had been obtained. The permission granted to the plaintiffs under the interim development order was dated Aug. 9, 1938, and was subject to a number of conditions of which the first was that the work should be commenced within six months and completed within eighteen months of Aug. 1, 1938, “failing which the consent shall become null and void”. Plans for the new buildings were approved, and on June 9, 1939, the plaintiffs entered into a written contract with contractors for the demolition of the existing buildings, and the clearing and preparing of the site, including the basement of the existing buildings which was to be incorporated in the new structure to be erected. This work was completed by Aug. 2, 1939. At that time war with Germany was regarded as imminent and no contract for the erection of the new buildings was entered into, and during the war the building project remained in abeyance. Execution of the scheme was resumed in November, 1948, when the plaintiffs gave notice to the London County Council of their intention to proceed, but the council refused to sanction the development of the site, and the Central Land Board refused the plaintiffs’ claim to exemption from development charge. The plaintiffs claimed that planning permission must be deemed to be granted to them by virtue of the Town and Country Planning Act, 1947, s. 78 (1).

Held: (i) (SIR RAYMOND EVERSHERD, M.R., *dissentiente*): in approaching the construction of the phrase “works for the erection or alteration of a building” in s. 78 (1) it was legitimate to bear in mind that the manifest object of the subsection was to accord some measure of protection to a building-owner who, on the faith of planning permission given under the law as it stood before the commencement of the Act of 1947, had incurred expenditure and done work with a view to the carrying out of a building project covered by such permission. It was, therefore, of relatively little importance whether the actual work in question was work of demolition or of construction, provided it was clear that the work genuinely formed part of the operations necessary to carry out a building project which would have been permitted under the old law. Therefore, in commencing and carrying out through their contractors the demolition of the existing buildings, the plaintiffs had begun works for the erection of a building within the meaning of the subsection, and planning permission must be deemed to have been granted.

(ii) the condition relating to time was not expressly or by necessary implication outside the purview of the Town and Country Planning Act, 1932, s. 10 (3), and, therefore, was not *ultra vires*, but the London County Council (the specified authority within s. 10 (3)) was bound by that subsection on its true construction to give reasons for the council’s decision to grant permission subject to conditions; such reasons not having been given, the council must be deemed to have granted

permission unconditionally; and, accordingly, the plaintiff's works could, immediately before the appointed day (July 1, 1948), "have been completed . . . in accordance with permission granted by or under an interim development order" within s. 78 (1) of the Act of 1947;

Decision of *HARMAN J.*, ante p. 9; reversed.

APPEAL by the plaintiffs, *Marks & Spencer, Ltd.*, from an order of *HARMAN, J.*, dated Dec. 4, 1951, and reported ante, p. 9.

The plaintiffs issued an originating summons to determine, inter alia, whether, on the true construction of the Town and Country Planning Act, 1947, s. 78, the plaintiffs had not before the appointed day (July 1, 1948) begun, but not completed, works for the erection of a building on a certain site, and (ii) whether, on the true construction of the Town and Country Planning Act, 1932, s. 10 (3), and the Town and Country Planning (General Interim Development) Order, 1933, the plaintiffs immediately before the appointed day had valid permission to complete the said works.

Capewell, Q.C., *J. R. Willis* and *V. M. C. Pennington* for the plaintiffs.

Lawrence, Q.C., and *H. E. Francis* for the first defendants, the London County Council.

Denys B. Buckley for the Central Land Board.

SIR RAYMOND EVERSLED, M.R.: This is an appeal from a judgment of *HARMAN, J.*, on an originating summons raising, in effect, the question whether the plaintiffs, *Messrs. Marks & Spencer, Ltd.*, are entitled to proceed with certain building operations on land of which they are lessees in St. Marylebone, without the consent of the first defendants, the London County Council, as the planning authority for that area within the meaning of the Town and Country Planning Act, 1947, and without paying any development charge to the second defendants, the Central Land Board, in accordance with the terms of that Act. This the plaintiffs can do if they bring themselves, but only if they bring themselves, within the scope of the Town and Country Planning Act, 1947, s. 78. The learned judge has concluded the matter against the plaintiffs.

The facts are not in dispute. They are fully dealt with in the judgment of *HARMAN, J.*, and I need not, therefore, repeat them at length. The following summary will, I hope, suffice. The freehold of, or the reversion to the plaintiffs' interest in, this land is vested in the Portman estate, and in August, 1937, the plaintiffs entered into an agreement with the Portman estate which involved the plaintiffs in taking down a number of existing buildings and erecting a large edifice which was to be used by the plaintiffs for offices in connection with their business. By this agreement these operations had to be completed by the end of 1939, but the time has been extended, and as between the Portman estate and the plaintiffs the plaintiffs are not now in default on that ground. But the plaintiffs do, of course, remain liable to the Portman estate under their agreement to perform the operations which were agreed between them, and they are paying in respect of the land a substantial rent.

The time when this agreement was made and the other matters which I am about to relate occurred was, nationally speaking, an anxious period. It was shortly before the outbreak of the second world war. In the spring of 1938 the plaintiffs invited tenders for the work which they had agreed with the Portman estate to undertake, and a number of tenders was put in. The plaintiffs were not satisfied that the prices charged in these tenders were such as they ought to pay, and they accepted none of them. They decided in fact, for the purpose of performing their obligations, to sever the work which had to be done into two separate sections. As regards the second—i.e., the erection of the

new office structure—they decided that they would engage the services of a well-known firm of building contractors, Bovis, Ltd., with whom they had had previous business transactions and had agreed a form of building contract which was described by the judge as a kind of cost-plus contract and was thought by the plaintiffs to be the most satisfactory. It followed that they would have to employ some other contractors to do the first necessary operation of taking down the existing buildings and preparing the site for the erection of the new.

On June 16, 1938, Mr. Bennett, the agent for the plaintiffs, applied to the London County Council under the then Town and Country Planning Act, 1932, and the Town and Country Planning (General Interim Development) Order, 1933 (S.R. & O., 1933, No. 236), for the permission of the council, as planning authority, for this building which it was proposed to erect. As I follow it, however, this application related exclusively to the erection, on a site assumed to be cleared, of the new office building illustrated in the plans submitted. The permission which the plaintiffs sought was granted on Aug. 9, 1938, subject to certain conditions. As I have referred to it at this stage, it may be convenient that I should read the first of a number of conditions, because a good deal of the later part of the argument turns on it. The form which this letter of Aug. 9, 1938, took was :

" With reference to Mr. Bennett's application dated June 16, 1938, I am directed to inform you that the council, in pursuance of its powers under the above-named order, hereby permits the erection of a building at the premises known as [they are then defined] in accordance with plans . . . submitted subject to (1) The work being commenced within six months and completed within eighteen months from Aug. 1, 1938, failing which the consent shall become null and void . . . "

There then follow five more conditions, and the writer, the clerk to the council, is also directed to add that the permission is given subject to certain other matters which are specified on the second page. At the date of that document, Aug. 9, 1938, there did not exist any contracts with either Bovis, Ltd. or with any firm of demolition contractors for doing the whole of the operation which the plaintiffs had, by agreement with Portman estate, undertaken to perform. But in the following year, 1939, a contract was made with a firm of the name of Boyer, who were demolition contractors, to do the essential preliminary work of taking down the existing buildings, clearing and preparing the site, including the basement of the existing buildings (or the excavations which formed part of the existing building) which was to be incorporated in the new structure to be erected. Those demolition works, clearing the site, and so forth, had been completed, as I understand, by the end of July, 1939. To all of us, of course, that date brings back the recollection of a time of the utmost anxiety, and it is not, therefore, at all surprising that nothing further was done in the way of starting the work of erection or even of making a contract with Bovis, Ltd., or with any other person for that purpose. Indeed, the site was occupied then and thereafter in connection with the formation, in preparation for the forthcoming conflict, of fire-fighting units. There the matter remained until the war was fought and won, and until the plaintiffs resuscitated the question they had taken up so long before with the London County Council by inquiring whether they might now be taken as entitled to proceed with the building proposed on the faith of the permission given, notwithstanding that the first condition in the letter of Aug. 9, 1938, on the face of it showed that, the time limit having long

since expired, the consent under the Act of 1932 and the order of 1933 had become null and void.

I have said that in the period of the war and the immediately post-war period nothing was in fact done by the plaintiffs, either by way of physical work in making the new building or in making a contract with somebody else so to do, but it is proved quite clearly, and the judge finds as a fact, that the plaintiffs never at any time abandoned their firm intention to build this new structure. Indeed, they could not very well do anything else because they were under contract with their landlords, the Portman estate, so to do. It is, therefore, clear that the demolition work that was done in the summer of 1939 was done with a view, and solely with a view, to the erection of the building that they had promised the Portman estate to erect, which building was illustrated on the plans, and which plans, in turn, had been submitted to the London County Council as the basis for the granting by them of their planning permission.

So far as the duties of planning authorities are concerned, the matter is now governed by the Town and Country Planning Act, 1947. The broad scheme of that Act (which differs in certain material respects from its predecessor in 1932) is to be found in Part III, so far as relevant to this case, and the first material section, s. 12, provides by sub-s. (1):

"Subject to the provisions of this section and to the following provisions of this Act, permission shall be required under this Part of this Act in respect of any development of land which is carried out after the appointed day."

I interpolate that the appointed day for the purposes of this Act was July 1, 1948. Then sub-s. (2) gives a wide definition of the word "development" thus:

"In this Act, except where the context otherwise requires, the expression 'development' means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land."

It has been a question debated before us whether the three words "or other operations" in the circumstances include demolition. It does not seem to me to matter whether that formula does or does not include demolition. But it is the broad scheme of the Act, that for "any work" (which would plainly include the putting up of the new building proposed by the plaintiffs after July 1, 1948) permission is required under Part III subject to the other provisions of the Act which may operate to exempt any particular case.

The case of the plaintiffs, as I have already indicated, is that they are within the exemption of s. 78 (1) which provides:

"Subject to the provisions of this section, where any works for the erection or alteration of a building have been begun but not completed before the appointed day [July 1, 1948] then if immediately before that day those works could have been completed in conformity . . . with permission granted by or under an interim development order . . . planning permission shall, by virtue of this section, be deemed to be granted under Part III of this Act in respect of the completion of those works."

The permission which is contained in the letter of Aug. 9, 1938, was indubitably a permission granted under an interim development order. It states on the face of it that it is given under the Town and Country Planning (General Interim Development) Order, 1933. If, therefore, the plaintiffs can satisfy, first, the condition that there were existing "works for the erection of a building begun but not completed before" July 1, 1948, and, further, if it can be shown that those works could have been completed immediately before July 1, 1948, by

virtue of the permission contained in the letter of Aug. 9, 1938, then the plaintiffs are deemed to have permission under Part III in respect of such completion, i.e., the completion (to use the words of the sub-section) of "those works". It is, therefore, a case in which there are two fences which the plaintiffs must surmount, and I may say that it was the view of HARMAN, J., that they failed at each.

I must now turn to the first question, which has seemed to me to be a matter of great difficulty—whether the first condition is satisfied that there were here works for the erection of a building begun but incomplete on July 1, 1948. As regards that matter HARMAN, J., said (*ante* p. 13):

"In my judgment, it is really a question of fact whether, at the critical date, works for the erection of a building had been begun, but were not finished on the site. It was agreed before me that 'works', by reason of the use of the plural, must connote physical operations on the site. It is clear that the erection of a building need not have been begun, because otherwise no meaning would have been given to the words 'works for'. It seems to me that, if there had been here a building contract which involved the demolition of the old buildings before the erection of the new, it might well have been possible to say that, though the performance of the contract had proceeded no further than the demolition of the old buildings, that was, nevertheless, works for the erection of the new. This is not that case. Here the demolition contract stands alone, the contractors' work was finished and no further contract ever came into existence. In my judgment, it is not possible to say that the site as it was on the appointed day contained works for the erection of a new building. I am, therefore, of opinion that the plaintiffs fail."

The argument of the plaintiffs is that they have satisfied this formula because, say they, they began in 1939 an operation which consisted of works for the erection of a new building. They began by demolishing the old building, but the works, taken as a whole, were not completed because they had not gone on to the erection of the new building for which the demolition was preparatory. Against this, it is said on the other side that demolition works, though, no doubt, preparatory to works of erection, were in this case wholly distinct in themselves and began and ended years before July, 1948, without any start at all having been made on any new building. In that regard, there is no doubt that HARMAN, J., was much influenced by the absence of a building contract; he appears to have placed emphasis on it in the passage I have read. Counsel for the London County Council before us has not so much emphasised that particular aspect. His argument, shortly, is that if one reads the whole of s. 78 (1) the phrase "works for the erection of a building" is the same subject-matter as "those works", which is the phrase found later; that "those works" must have the quality that they are the subject of a permission granted; and that since here the demolition works were not so subject and were only connected with the proposed erection in the minds of the plaintiffs, therefore, the formula is not satisfied and the plaintiffs, as the learned judge held, must fail.

Whatever is the position under the Act of 1947—and counsel for the plaintiffs in his reply has suggested that works of demolition are within the meaning of the word "works" at any rate for many purposes of that Act—it is, as I understand, clear that under the Act of 1932, save in the case of buildings scheduled as being of special interest or of works comprised within s. 44, demolition, as such, is an operation which did not require any permission from the planning authority. A man might demolish buildings without any decision having been made by him at the time how afterwards he would seek to use the land, and in that case he would require no permission and the demolition of itself could not fairly in

that case be said to be part of the totality of an operation which necessarily comprehended the erection of a building. The demolition clearly could not in that case, I should have thought, be "works for the erection of a building". I also have no doubt that in ordinary parlance and among those who are engaged in the trade of contractor, whether a building contractor or a demolition contractor, the word "works" in the plural is one of common currency, and will or may certainly include works of demolition, excavation and the like. Indeed, in opening his case before us counsel for the plaintiffs put it that the word "works" can be and should be construed, where you find it in these Acts, according to the context in which it from time to time appears. But after looking at the relevant sections in both Acts, including definitions, I am bound to say that in their context here the words "works for the erection" do not strike me as *prima facie* intended to include works of demolition. The point is obviously a narrow one, and, although on this matter I regret to find that my own conclusion is not shared by either of my brethren, I am, for my part, of opinion that the argument of counsel for the London County Council is correct, and that on this part of the case the learned judge's conclusion ought to be sustained.

I think there are two ways in which the matter may be tested. The first is the way I ventured to put it to counsel for the plaintiffs during his reply. If (as it is said by him) there were on July 1, 1948, works for the erection of a building begun but not completed, then what were they? I took a note of his answer, and he said they were the demolition, the clearing of the basement so as to be incorporated in the new building, the erection of hoardings and a gate, and the preparation for building a new building—i.e., the approval of the plan, plus the intention to build, and the contract to build. I am bound to say that I cannot for my part bring that concatenation of things all within the phrase "works for the erection of a building", and it seems to me to resile from what has been said and accepted below, that "works" must be physical operations carried out on the land. JENKINS, L.J., suggested that a more prudent answer would be, "the totality of the operations to be carried out on the site as defined in the building agreement". I will assume that it was true to say, on July 1, 1948, and could have been said many years before, that under the agreement with the Portman estate the plaintiffs were bound to carry out certain specified building operations on the site which would terminate in the appearance on the site of the new edifice which is illustrated on the plans, and if it can be said that those operations had been begun and not completed, then it may well be that the answer is as counsel suggested it should be. But I am not satisfied that, for the purpose of construing this section, one is entitled to take into account the fact that the plaintiffs, the building owners, had made some arrangement or contract with a third party to erect a particular building. If that is right, then it would appear to me to follow that if the plaintiffs could establish that they had made up their minds, apart from any obligation by contract, to erect a particular building, it could equally be said that the demolition works were part of those total operations though the total operations were merely, so to speak, in the minds of the plaintiffs. It may or may not be that demolition is something which requires permission under the new Act and did not under the old. I can well understand that plans put forward for approval may on the face of them show and include the demolition to be done as part of the total operation, even though for the demolition taken by itself no planning permission would be required. Thus, to take the alternative in the sub-section of "works for the alteration of a building", there would, I take it, appear on the plans submitted what had first to be taken down in order

that the altered thing might be put in its place, and in all those cases I think it would be right to say that the first stages, which consisted of the destructive part of the work, were part of the "works for the erection or alteration of a building". I also agree that the formula "works for the building" must have a wider significance than would be covered by the words "works of building", but that does not, in my judgment, suffice for the facts of the present case.

What I have said is, perhaps, putting in another way (and it may be not put so well) the main argument put by counsel for the London County Council, which is to the effect that, if one reads the sub-section as a whole, the "works for the erection of a building" are "those works which could have been completed in conformity with the planning permission", and when in this case one asks what those works were and one looks accordingly at the permission given under the Act and order, one finds that the only works for which permission was given were works for the erection of a new building independently of (though, no doubt, based on the assumption of) a previous clearing of the site, and of those works, as distinct from the first clearing operation, there is not any doubt that they had not been begun at the material date. As I have indicated, I think that the question is one, perhaps, in large degree of first impression, and when I come back and ask the question: What in the present case were "works for the erection . . . but not completed before July 1, 1948"? I am not satisfied that an answer can be given by the plaintiffs which is satisfactory and entitles them to say they are within the ambit of the protection.

I should, therefore, on that ground dismiss this appeal, but, as I have said, my brothers take a different view, and in the circumstances I must pass, though I shall deal with it briefly, to the second hurdle with which the plaintiffs are confronted. It is this: Assuming that these are "works", then are the plaintiffs now entitled to complete them by virtue of this planning permission given on Aug. 9, 1938? I have already stated that on the face of the letter the answer would be in the negative because, the work not having been completed within eighteen months from Aug. 1, 1938, the consent is expressed to have become null and void. But the first point taken by counsel for the plaintiffs is that this condition which I have read is wholly void and ineffective, because there is no power in the planning authority to impose a condition as to time. The learned judge rejected that view, and I reject it also, on the simple ground that I find nothing in the relevant terms of the relevant Act to limit the conditions which may be imposed so as to exclude conditions of time. The relevant part of the relevant Act is s. 10 (3) of the Act of 1932:

"Where an application for permission to develop land is made to the specified authority in manner provided by the order, the authority may, subject to the terms of the order, grant the application unconditionally or subject to such conditions as they think proper to impose, or may refuse the application . . ."

I can find nothing in that context, or anywhere else in the Act—for instance, in para. 19 of sched. II, to which we were referred—which would entitle the court to say that the words "subject to such conditions as they think proper to impose" must be read with the qualification "provided that they are not conditions as to time". I, therefore, reject that part of the answer.

The second matter raised by counsel for the plaintiffs has been much more difficult, though it turns again, I think, as did the first point, very much on a first impression of the language used. The argument used is that by the effect of s. 10 (3) of the Act of 1932, which I have partly read, and to which can be joined the terms of the order of 1933, no condition can be validly imposed unless reasons

for its imposition are given. The effect, therefore, if that argument is right, is either that under the terms of the rest of the sub-section (which I will read in a moment) the London County Council is to be deemed to have granted an unconditional permission, or one is entitled to treat this permission granted on Aug. 9 as unembarrassed by the conditions which were invalidly added to it. The language of s. 10 (3) refers to the terms of the order, and that order is the one mentioned in s. 10 (1):

"The Minister shall make a general order with respect to the interim development of land . . ."

The Minister did make a general order in 1933, to which I have already alluded. Section 10 (3), after the part which I have already read, continues as follows:

" . . . and they [the planning authority] shall be deemed to have granted the application unconditionally unless within two months from the receipt thereof, or within such longer period as the applicant may agree in writing to allow, they give notice to him that they have decided to the contrary, stating their reasons for so doing."

If it is permissible to have regard to the order, the matter appears to be made tolerably plain, because art. 10 of the order of 1933 is:

"The grant or refusal of permission by the interim development authority for development to proceed shall be in writing and, where the authority decide to grant permission subject to conditions, or to refuse permission, the reasons for their decision shall be stated in writing."

It is, therefore, beyond doubt that the terms of the order state that a conditional grant of permission shall contain in writing the reasons for the conditions imposed or at least for the imposition of conditions. Counsel for the London County Council said that the order cannot have the effect of increasing the obligations imposed by Parliament on the authority. I am not quite sure that that is right, because s. 10 (1), as I have said, requires the Minister to make a general order with respect to interim development, and s. 10 (3) provides that where an application for development is made "the authority may, subject to the terms of the order, grant the application", etc.

Assuming in counsel's favour that the matter does depend, and depends exclusively, on the terms of s. 10 (3) itself, then the question revolves round the simple question what is meant by the phrase "they have decided to the contrary". To the contrary of what? That is the problem. It is not, I am bound to say, a happy piece of phrasing, and it has led to long arguments and many suggestions as to what might be meant by those words "to the contrary". If it means they have decided not to grant, unconditionally, an application, then, presumably, a decision to grant a conditional permission would be "to the contrary". Counsel for the London County Council suggested that "to the contrary" in its context really means that they have decided to refuse permission altogether. I have on the whole been unable to accept that view. I do so with some regret because I must say that it seems to me extraordinary that the authority is required to give reasons for every condition that they impose, even though the reason for the imposition of the condition is absolutely obvious. Thus, to take the example given by JENKINS, L.J., if permission is granted subject to there being a proper fire escape provided, it seems absurd that the authority must say: "The reason for this condition is so that people should be able to escape from the building in case of fire." However, the question is: What is the true interpretation of the words used? There is no doubt that at the back of it lies this important consideration, that there is given to the applicant

an opportunity, if he feels aggrieved, of going by way of appeal to the Minister. I turn, accordingly, to s. 10 (5) of the Act of 1932, which seems to me to contain within it the answer to this problem. Section 10 (5) provides:

"An applicant who is aggrieved by the refusal of the authority to consent to his application, or by any conditions imposed by them, may within twenty-eight days from the date on which he received notice of the decision of the authority, or such longer period as the Minister may allow, appeal to the Minister..."

Three possibilities are envisaged in s. 10 (3), viz., unconditional permission, absolute refusal, or permission subject to conditions. When one turns to s. 10 (5), it is dealing indifferently with the second and the third. It deals with the case of absolute refusal and also with permission subject to conditions. Both those are spoken of as "decisions" of the authority, which refers one back, I think, to the "decision" mentioned at the end of s. 10 (3), where the language is "give notice... that they have decided to the contrary". If that be right, it must follow, I think, necessarily that a decision "to the contrary" comprehends a decision to grant permission subject to conditions. If that is so, this matter must be, I think, decided in the plaintiffs' favour. I add that, although it is easy to see cases (I have given an example) where it seems supererogatory to have to give reasons in writing, I can also see that it would be difficult for an applicant who is aggrieved to put his case or even to give satisfactory reasons for his dissatisfaction unless he was given reasons by the planning authority why they have imposed a particular condition. If an appellant appeals against the imposition of a condition without knowing why it is imposed, it is obvious that he might be faced on appeal with an explanation by the planning authority which would make it impossible for him to argue, or put him in the difficulty that he had come unprepared to deal with what turned out to be the real point to be argued. For these reasons I take a different view on this point from that which the learned judge took. It turns on a very small point as to the meaning of a few words. Having regard to the view I take on the first point, I think that the appeal should be dismissed, but having regard to the conclusion reached by my brothers the appeal must be allowed.

JENKINS, L.J.: To my regret I find myself unable to agree with my Lord as regards the answer to the first question in this case, i.e., the question whether on the facts the plaintiffs had, with respect to their Paddington Street and Chiltern Street site, begun works for the erection of a building. The facts, if I might briefly recapitulate them, were these. The plaintiffs had entered into a building agreement with respect to the site, under which the plaintiffs were bound, directly or indirectly, to the Portman estate to erect a building in accordance with certain plans and specifications approved by the Portman estate. The plaintiffs had obtained planning permission, subject to the conditions which my Lord has mentioned, and to which I will return, for the erection of that same building. With a view to carrying out the project and in accordance with their contractual obligations under the building agreement, the plaintiffs had cleared the site for the erection of the projected new building, although the supervening difficulties occasioned by rumours of war and ultimately by war itself had prevented them from carrying the project any further than that.

Those being the facts in barest outline, had any works for the erection of a building been begun on this site, but not completed before the appointed day, within the meaning of the Town and Country Planning Act, 1947, s. 78 (1)? The answer to that question turns in the end on the meaning to be attached to

the phrase "works for the erection or alteration of a building" contained in the sub-section, but, in approaching the construction of that phrase, it seems to me legitimate to bear in mind that the manifest object of s. 78 (1) was to accord some measure of protection to a building owner, who, on the faith of planning permission given under the law as it stood before the commencement of the Act of 1947, had incurred expenditure and done work with a view to the carrying out of a building project covered by such permission. Therefore, it seems to me that the intention of the section makes it of relatively little importance whether the actual work in question is work of demolition or of construction or of anything else, provided it is clear on the facts that that work did genuinely form part of the operations necessary to carry out a building project which would have been permitted under the old law.

Returning to the phrase against that background, it is "works for the erection or alteration of a building". That phrase seems to me to be a phrase of wide import, and the inference is that it was adopted so as to cover a wide field of work. If the legislature had intended to confine the application of s. 78 (1) to cases where buildings had been begun, but had not been completed, inevitably the section would have run: "Where the erection or alteration of a building has been begun, but not completed". Here we have "works for the erection or alteration of a building", so as to include in terms operations which are not in themselves building operations. For my part I find irresistible the conclusion reached by HARMAN, J., as to the meaning of these words when he said (ante p. 13):

"It is clear that the erection of a building need not have been begun, because otherwise no meaning would have been given to the words 'works for'."

It is, therefore, in my view, not necessary, in order to bring a case within the sub-section, that one should be able to point to some work of construction on the site and say: "That is part of the new building the erection of which has been begun". It is enough if on the facts one can conclude that on the site in question operations have been carried out which are part of the totality of operations necessary on that site for the purpose of carrying to completion a particular building project. Where it is shown by the evidence that a building owner had in view a particular building project to be carried out on a site already built on and that his intention to carry out that project had never been abandoned, then work such as the demolition of the buildings already on the site, as a necessary preliminary to the carrying out of the building project, would, in my judgment, be "works for the erection or alteration of a building" within the meaning of the sub-section. Of course, where the works are of such a nature that in themselves they might or might not be works which were being carried out for the purpose of executing some particular building project, it may well be that the onus is then on the building owner to show, and to show clearly, that his intention from the outset had been to carry some particular building project through to a finish. Obviously, where a man had started pulling down a house with no more than a general intention of erecting something else in its place, he could not come within the sub-section. Indeed, the very frame of the sub-section and the whole scheme of the Act would exclude such a one from the benefit of the sub-section, for s. 78 (1) in itself contemplates and necessarily refers only to a case where there is a projected building or alteration in respect of which planning permission has been obtained.

In the present case, on the footing that the construction of the phrase "works for the erection or alteration of a building" which I have adopted is the right

construction, there is, to my mind, no doubt that, in commencing and carrying out through their contractors the demolition of the existing buildings, the plaintiffs had begun works for the erection of a building. There is no doubt about their intention. There is no doubt about the identity of the projected building. Not only was it the building referred to in the planning permission obtained in 1938, but it was also the building which the plaintiffs were under contract, directly or indirectly, with the Portman estate to erect. HARMAN, J., as appears from his judgment, might well have come to the same conclusion as I have reached but for the fact that the plaintiffs, in the events which happened, entered into a contract for the demolition of the existing buildings with a demolition specialist who did not undertake any of the work of constructing the new building, whereas, so far as the work of constructing the new building was concerned, they had dealt with that separately through a firm named Bovis, Ltd., and had only made provisional arrangements with them for the building work, not amounting to a firm contract. But for my part, provided it is plain that the building owner concerned did genuinely intend to erect a particular, identifiable, projected building on the site of existing buildings, it cannot matter what contractual arrangements he may have made as regards the demolition of the old buildings and the erection of the new one. That is to say, the answer cannot depend on whether he has got one contractor to pull down and re-build or has got two contractors, one of whom is going to do the demolition and the other the construction. Here, I think, the projected building is well identified, if only by reference to the building agreement.

The argument to the contrary, pressed on us by counsel for the London County Council, was to this effect. He said that the test to be applied in seeing whether given work qualified for the benefit of s. 78 (1) was a purely objective test, that one must go to the site and see whether there was any work begun but not completed on the site for which planning permission was required and had been obtained. Nothing short of that, according to him, would come within the sub-section. He put the matter in three points. He said that for s. 78 (1) to apply (a) there must be works which have been begun; (b) those works must be uncompleted; and (c) they must be part of an operation which required planning permission. He pointed out that demolition was not in any relevant respect an operation which required any planning permission at all. The work which had been begun here, he said, was simply the work of demolition, for which no such permission was necessary, and, therefore, it did not fall within the words

"those works could have been completed in conformity with the provisions of a planning scheme or of permission granted thereunder, or in accordance with permission granted by or under an interim development order."

Planning, he said, was quite irrelevant to demolition. In my view, that construction contains the fallacy that it treats "those works" as the particular type of work or type of operation that has been actually embarked on. Of course, if one applied s. 78 (1) to mere work of demolition taken by itself and treated that as "those works", there would be no question of those works having been the subject of permission, and it would be reasonably plain that the section did not apply. Moreover, the demolition as such, if treated as a separate thing, would not only have been begun; it would have been completed. But, in my view, that is wrong. I think "those works" must mean the works for the erection or alteration of the particular building referred to earlier in the sub-section. I think that must be so, for the test of the application of the sub-section where

it is satisfied in other respects must, as it seems to me, be whether the permission was granted for the carrying out of the projected building operations to completion and not whether permission was granted for some mere branch or department of the work. If "those works" is construed in that way, I think the argument no longer applies.

Counsel for the London County Council also suggested that "works" in this context should be construed as meaning works which have something in the nature of a physical presence on the land, as opposed to mere demolition which cannot be said to leave anything physically present on the land, but merely produces an empty space where buildings existed before. He referred us to a number of sections (I will not take up time by referring to them again) where there were references to (for instance) the demolition or alteration of any buildings or works or to decisions that any buildings or works should be altered or removed, and there is no doubt that there are through the Act a number of references to works in contexts which show that "works" are regarded as physical objects. But I do not think it follows that in every case "works" is to be given that meaning. For instance, in s. 30 (6) of the Act of 1947, which is one of the sections dealing with ancient buildings, there is the passage to which counsel referred us to the effect that so long as any building is included in any list compiled or approved under this section no person shall execute, or cause or permit to be executed, any works for the demolition of the building. Counsel for the plaintiffs referred us to the Town and Country Planning Act, 1932, s. 44, which provided, as to works below high-water mark, that

"Nothing in this Act shall authorise the execution of any works whether of construction, demolition or alteration on, over or under tidal lands below high-water mark of ordinary spring tides . . ."

Therefore, it seems to me that the word "works" is well capable in this legislation of including works of demolition, and I think that is in accordance with ordinary English usage in the field of building operations, where the expression "works" is current.

The point is a short one and does not admit of any great elaboration. As my Lord has said, it is largely a matter of first impression. We were pressed by counsel for the London County Council with the absurdities that might arise if the plaintiffs' construction of the sub-section were adopted. What, it is said, of a man who, allegedly with a view to the ultimate erection of a new building, sets about demolishing an existing building and has got no further than removing two tiles or a gutter? It is suggested that in a case of that kind it would be absurd to give the individual in question the protection of s. 78 (1), even though the project of which the removal of the two tiles or the gutter was the beginning was a project in respect of which in all relevant matters planning permission had actually been obtained under the old law. But arguments by way of reductio ad absurdum cut both ways, and, on the other hand, it might equally be said to be absurd that a building owner who had spent thousands of pounds on the demolition of valuable buildings with a view to erecting another building in their place should not be protected merely because he had not actually started the building work, while another person who had prepared his site at far less cost should be protected because his work had just arrived at the stage of construction and it was possible by diligent search to find somewhere on the site two bricks laid one on top of the other in the positions which they would respectively occupy in the completed building. As I have said, it is a question of first impression, and I will say no more about it except that, after giving the best attention I can to the arguments the other way, and with some diffidence owing to the

different opinion of my Lord, I have come to the conclusion that the plaintiffs, within the meaning of s. 78 (1), had begun works for the erection of a building on the site in question before the appointed day, but had not completed them before the appointed day, with the result that the plaintiffs are entitled to succeed in this case provided they can bring themselves within the second branch of the sub-section.

To do that, as my Lord has said, they must show that immediately before the appointed day those works—i.e., as I construe the sub-section, the totality of the building operations—could have been completed in conformity with the provisions of a planning scheme or of permission granted thereunder or in accordance with permission granted under an interim development order. If that was so then in the words of the sub-section

“ . . . if any permission required under the Restriction of Ribbon Development Act, 1935, for the carrying out of those works was granted, planning permission shall, by virtue of this section, be deemed to be granted under Part III of this Act in respect of the completion of those works.”

That depends on the effect of the conditional planning permission of Aug. 9, 1938, having regard to the terms of s. 10 of the Act of 1932 and of the Town and Country Planning (General Interim Development) Order, 1933, art. 10. The vital provision is in s. 10 (3), to which my Lord has already referred. I hope I will be excused for reading it again:

“ Where an application for permission to develop land is made to the specified authority in manner provided by the order, the authority may, subject to the terms of the order, grant the application unconditionally or subject to such conditions as they think proper to impose, or may refuse the application, and they shall be deemed to have granted the application unconditionally unless within two months from the receipt thereof, or within such longer period as the applicant may agree in writing to allow, they give notice to him that they have decided to the contrary, stating their reasons for so doing.”

The whole matter, so far as it depends on s. 10 (3), turns on the meaning of the words “ to the contrary ”. As a matter of language, I think it is reasonably plain that “ notice . . . that they have decided to the contrary ” must mean notice that they have decided not to grant the application unconditionally, the words being

“ they shall be deemed to have granted the application unconditionally unless . . . they give notice . . . that they have decided to the contrary.”

In my view, that must mean that they have decided not to grant it unconditionally. It is said on the other side that “ to the contrary ” connotes an exact opposite, a complete negation of what has gone before, as opposed to a mere variation of what has gone before, and it is suggested, therefore, that “ decided to the contrary ” means “ decided not to grant it ”. With respect to those who think otherwise, I cannot accept that, as a matter of language. But, if it is accepted, it seems to me that grave difficulties ensue, for then the relevant part of sub-s. (3) reads: “ The authority may . . . grant the application unconditionally or subject to such conditions as they think proper to impose, or may refuse the application, and they shall be deemed to have granted the application unconditionally unless . . . they give notice . . . that they have decided not to grant the application, stating their reasons for so doing ”, and that would,

apparently, produce the result that they could never grant an application conditionally, because in all cases they would be deemed to have granted the application unconditionally unless they gave notice that they had decided not to grant the application at all.

Accordingly, I think that s. 10 (3) really admits of only one construction. I appreciate the force of the learned judge's observations to the effect that one can understand that where unqualified refusal was in question it was very desirable that reasons should be given, but that where it was merely a matter of imposing conditions, and, subject to those conditions, allowing the application, it was not apparent why reasons should be considered necessary, for the applicant would receive his permission with the conditions on which it was granted stated for him to see, and would, therefore, for the purposes of any appeal, know exactly what the conditions were. I also agree with my Lord that one can imagine examples where the giving of reasons for the imposition of conditions would be a palpable absurdity. But these considerations, in my judgment, are not enough to override what seems to me to be the reasonably plain language of s. 10 (3). My Lord has referred to the support which this construction derives from s. 10 (5), and I need not take up time by developing that point again. One may add that the Town and Country Planning (Interim Development) Act, 1943, which reversed the former rule and enacted (in effect) that permission should be deemed to be refused unless it was granted, seems to assume the construction of s. 10 (3) which I have placed on it, for one finds in s. 2 (5) of the Act of 1943 that

"Nothing in this section shall be construed as affecting the duty of an interim development authority . . . (b) to give notice to the applicant of their decision upon the consideration of any such application, including, where the application is refused or granted subject to conditions, a statement of the reasons for their decision."

I am, therefore, of opinion that, inasmuch as the authority here failed to state their reasons for granting the permission of Aug. 9, 1938, subject to conditions and not unconditionally, they must be deemed by the terms of s. 10 (3) to have granted the application unconditionally. Other grounds of objection to this form of permission were urged before us which would lead to substantially the same consequences. Counsel for the plaintiffs endeavoured to persuade us that the first condition, which imposed a time limit for the completion of the work after which the consent was expressed to become null and void was wholly *ultra vires* and, therefore, bad. I cannot take that view, for s. 10 (3) expressly empowers the authority to grant the application subject to such conditions as they think proper to impose without anything relevant to the question of time to suggest that the generality of that expression is to be in any way cut down. There is nothing expressly to the effect that conditions as to time are not to be imposed, and I can find nothing in the other provisions of the Act which would make the imposition of a time condition so palpably repugnant as to be by necessary implication outside the purview of the Act, and, therefore, *ultra vires*. Accordingly, I cannot accept the argument based on *ultra vires*, though the plaintiffs achieve the same goal by a different road.

It only remains to mention the Town and Country Planning (General Interim Development) Order, 1933, art. 10, which provides:

"The grant or refusal of permission by the interim development authority for development to proceed shall be in writing and, where the authority decide to grant permission subject to conditions, or to refuse permission, the reasons for their decision shall be stated in writing."

That reinforces the view that the authority is placed under a statutory duty to give reasons for its decision where the decision is to grant permission subject to conditions or to refuse permission, and I think the result might well have been that failure by an authority to give reasons would have enabled an aggrieved applicant, by appropriate process, to obtain an order on them to state their reasons. But I am not satisfied that art. 10 of the order would in itself affect the actual validity of a refusal or the actual validity of conditions purporting to be attached to a consent. I prefer, therefore, to base myself simply on the construction of s. 10 (3) and the construction which I have placed on that sub-section leads, as I have said, to the conclusion that permission must be deemed to have been granted. It follows, in the view I take, that the plaintiffs succeed on both the questions on which their claim to the benefit of s. 78 (1) depends, and they are, accordingly, entitled to such benefit. The appeal should, therefore, be allowed.

MORRIS, L.J.: The first question which arises in this appeal is whether the plaintiffs bring themselves within the opening words of the Town and Country Planning Act, 1947, s. 78. The inquiry is raised whether works for the erection of a building had been begun before the appointed day, viz., July 1, 1948. The Act of 1947 contains a number of definitions. There is a definition of the phrase "buildings or works", but no definition is to be found of the word "works". The word "erection" is defined as follows:

"'erection' in relation to buildings includes extension, alteration and re-erection."

"Building operations" is defined to include

"re-building operations, structural alterations or additions to buildings, and other operations normally undertaken by a person carrying on business as a builder."

There is also a definition of the word "clearing", which

"in relation to land, means the removal of buildings or materials from the land, the levelling of the surface of the land, and the carrying out of such other operations in relation thereto as may be prescribed by regulations made for the purposes of this Act."

There is, of course, a definition of "development", which I do not read again.

In the course of his submissions on this part of the case counsel for the London County Council submitted that the word "works" should be interpreted as denoting some positive operations of a constructional nature. Another part of his submissions was that when the word "works" in the second line of s. 78 is compared with the phrase "those works", to be found in the fourth line of s. 78, it is manifest that there is a reference to the same thing, and counsel submits that the reference is to what he has described as the "controlled operations". So he submits that the word "works" denotes operations of a positive, constructional nature for which permission was needed, and he submits that permission was not needed under the Act of 1932 for demolition. In support of the first of those two submissions to which I have referred, counsel has invited our attention to a number of sections of the Act of 1947 where the word "works" is to be found. He has, for example, referred us to s. 30 (6), to s. 23 (2), to s. 26 (1) (b), and to other sections. In some places the reference is to the words "buildings or works". We were also referred, by counsel for the plaintiffs, to s. 44 of the Act of 1932. The word "works" also appears in the Town and

Country Planning Act, 1947, in s. 75, which begins with the words: "Where any works on land existing at the appointed day were carried out".

In the absence of any definition of the word "works" it seems to me that the word is not to be regarded as a term of art, but that it is really quite a wide term. The word may not be used in all places with precisely the same meaning. It has, in my judgment, in s. 78 the meaning of things done or to be done. I do not myself attempt any definition of the word, for the obvious reason that, as Parliament has not defined it, it would be unnecessary, and, perhaps, unfortunate, to attempt a definition. The word has a wide variety of meanings. It is, for example, used in ordinary speech in the phrase "works of charity", presumably to denote no more than things done of a charitable nature. In its context in s. 78, in my judgment, the word refers to the totality of things necessary to be done for the purpose of erecting a building. The phrase has to be regarded in reference to the facts of each particular case. The question whether works for the erection of a building have been begun becomes, in my judgment, a question of fact and of degree, depending on the circumstances of each particular case. What happened in the present case was that after the plaintiffs had, in August, 1938, obtained the consent of the London County Council under the General Interim Development Order, 1933, they then proceeded to get tenders for the erection of a building, including demolition and the clearance of the site. They received a number of tenders, but each one of the tenders received exceeded the amount that they had been led to expect would be the probable amount having regard to figures supplied to them by their quantity surveyor. So, according to the affidavit of Mr. Lees, it was decided to entrust the work to Bovis, Ltd. Because of the international situation there was delay. By the early part of 1939 the Portman estate were pressing the architects to begin building operations. In para. 9 of his affidavit Mr. Lees said:

"By March, 1939, however, the Portman estate, as freeholders, were pressing the company through its architects to commence building operations in accordance with the agreement A.E.L.2 and pointed out that the agreement provided for completion of the entire building by the month of December, 1939. Accordingly, in April, 1939, the company decided to commence building operations and as a first step to proceed with the necessary works of demolition and clearance from the site of all existing buildings."

In his judgment HARMAN, J., says (ante p. 11):

"Mr. Lees, estate manager of the plaintiffs, who was cross-examined before me, stated that when the plaintiffs entered into this contract they intended to proceed, after the demolition was completed, with their rebuilding scheme. This evidence I accept. Indeed, the conclusion seems obvious, for persons in the plaintiffs' position, who are paying some £800 a year in rent, do not demolish buildings which might reasonably be expected to let for a considerable part at any rate of that sum unless they intend to replace them by other buildings more to their purpose."

It seems to me that the effect of the evidence accepted by the learned judge was that the plaintiffs, after a delay, did decide to begin works for the erection of a building. It does not seem to me to matter at all that one part of the works was assigned by contract to one contractor and that the rest was to be undertaken by another contractor. It might be, in the circumstances of a different case, that work of demolition could not be described as "works for the erection of a building". But, as I have indicated, in my judgment the matter is one of fact and degree, depending on the circumstances of each case. In this case, in

my view, the plaintiffs did decide to begin, and did begin, works for the erection of their new building.

In regard to the second of the two submissions of counsel for the London County Council to which I referred, in my judgment, the works "could have been completed in accordance with permission granted under an interim development order", assuming that that permission was valid. The works must be deemed to be the totality of what had to be done to erect the building. Those works could have been completed in accordance with the permission granted. The words in s. 78 (1) do not involve that permission is needed for each and every part, phase and deed, provided that the work of erection can be completed within the ambit of permission so that when the building is complete nothing is out of conformity with or out of accord with or beyond any permission given where any permission is required. With a diffidence which I naturally feel when I find that my opinion does not coincide with that of my Lord, the Master of the Rolls, I have reached the conclusion on this first question that the plaintiffs had begun works for the erection of a building before the appointed day.

The second question is whether there was permission under an interim development order. The interim development order that was in operation was that of 1933. Section 10 of the Act of 1932 is in different terms from s. 45 of the Housing, Town Planning, etc., Act, 1919; and the Town and Country Planning (General Interim Development) Order, 1933, is in different terms from the Town Planning (General Interim Development) Order, 1922 (S.R. & O., 1922, No. 927). Under that order, by art. 7, it was provided:

"The local authority shall as soon as may be, inform the applicant in writing that his application for permission to proceed is granted or refused, as the case may be, and, if the application is granted, state in writing the terms of any requirements which they may impose."

But the Act of 1932 introduced new language, and the language of s. 10 (3) calls for consideration. I need not refer to s. 2 of the Act of 1943, which has been referred to by JENKINS, L.J. The provision in that Act is not decisive, but it is at least interesting to note the interpretation that then was assumed.

In regard to the question whether it was legitimate to impose a condition in regard to time, I am in full agreement with all that my Lords have said and I do not desire to add anything. Section 10 (3) provides that three courses may be followed, and they are stated in this order: first, the authority may grant unconditionally; or, secondly, they may grant subject to conditions; or, thirdly, they may refuse. The section then provides that they shall be deemed to have granted unconditionally unless within two months they shall give notice "that they have decided to the contrary, stating their reasons". That, in my judgment, means, to the contrary of granting unconditionally, which was the first of the three possibilities. What, then, is the contrary, or the opposite, of granting unconditionally? Perhaps the most obvious opposite is the second, viz., granting conditionally; but also there is the third, viz., refusing. It seems to me, therefore, to follow that the application was to be deemed to have been granted unconditionally unless two things were done—(i) unless there was notice that the authority had decided to the contrary of granting unconditionally, and (ii) unless they had given reasons. There is no dispute that in the present case the authority did not give reasons. It, therefore, follows that they must be deemed to have granted permission unconditionally. It is no answer to say that reasons might have been given which would have been poor in quality or in quantity, or which might have contained glimpses of the obvious. The result, therefore, is that, in my judgment, following the words of s. 78 (1) of the

Act of 1947, planning permission should, by virtue of the section, be deemed to be granted under Part III of the Act of 1947 in respect of the completion of those works. From that conclusion the consequence as to development charge follows. I am, therefore, in agreement that this appeal should be allowed.

Appeal allowed.

Solicitors: *J. C. Parry* (for the plaintiffs); *J. G. Barr* (for the London County Council); *Treasury Solicitor* (for the Central Land Board).

F.G.

COURT OF APPEAL

(SINGLETON AND MORRIS, L.J.J., AND LLOYD-JACOB, J.)

Feb. 12, 13, 14, Apr. 7, 1952

BUCKINGHAMSHIRE COUNTY COUNCIL v. CALLINGHAM AND ANOTHER

Town and Country Planning—Enforcement notice—"Works on land"—Contravention of previous planning control—Work done after town planning resolution—No permission under Town Planning (General Interim Development) Order, 1933—Town and Country Planning Act, 1947 (10 and 11 Geo. 6, c. 51), s. 75 (9).

The occupier of a piece of land erected thereon a model village consisting of buildings from two to four feet high and other features, including a model railway. Part of the village was completed before Sept. 24, 1929, on which date the local authority passed a resolution to prepare a town planning scheme under the Town and Country Planning Act, 1925, and as to that part no question arose. The occupier continued the construction of the village after that date, without applying for permission under the Town Planning (General Interim Development) Order, 1922, which was then in force. On Apr. 1, 1933, the Town and Country Planning (General Interim Development) Order, 1933, made under s. 10 (1) of the Town and Country Planning Act, 1932, came into force, and after that date additional work was done without applying for permission under the order of 1933. The Town and Country Planning Act, 1947, which repealed earlier legislation, empowered the planning authority to grant permission for the retention on land of any buildings or works previously constructed or carried out thereon, but no application for permission was made.

Section 23 of the Town and Country Planning Act, 1947, authorises the service of enforcement notices when development of land has been carried out after July 1, 1948, without permission. By s. 75 (1) the procedure is extended to cases where works on land existing at that date were carried out, or use of land at that date was begun, in contravention of previous planning control. By s. 75 (9) works are deemed to have been carried out or use begun in contravention of previous planning control: "(a) where at the material time the land was subject to a resolution to prepare a planning scheme, if carried out or begun otherwise than in accordance with permission granted in that behalf by or under the interim development order; (b) where at the material time the land was subject to a planning scheme, if carried out or begun otherwise than in conformity with the provisions of the scheme or of permission granted thereunder . . ." The local planning authority served an enforcement notice under s. 23 and s. 75 (9) of the Act, requiring the occupier to demolish or remove building, engineering and other operations on the land erected after Sept. 24, 1929.

HELD: the works in question were carried out in contravention of previous planning control, and, accordingly, the enforcement notice was good.

Decision of DIVISIONAL COURT (1951) (115 J.P. 587) affirmed.

APPEAL by the occupier of land on which a model village was constructed and by a trustee of the organization operating the model railway therein against an

order of the Divisional Court dated Oct. 12, 1951, and reported (1951) 115 J.P. 587. The respondents, the Buckinghamshire County Council, served an enforcement notice requiring the demolition or removal of some of the works. The appellants preferred a complaint to the justices that the notice was wrongly served, on the ground that the operations were not "works on land" and that they had not been carried out in contravention of previous planning control. On Mar. 9, 1951, the complaint was heard by Buckinghamshire justices, who found that the works were not within the ambit of the planning Acts, and quashed the enforcement notice. The county council appealed to the Divisional Court, who held that the works were within the Acts, and that the enforcement notice applied to work done since Sept. 24, 1929.

H. P. Stirling (H. I. Willis with him) for the appellants.

W. L. Roots for the county council.

Cur. adv. vult.

April 7. The following judgments were read.

SINGLETON, L.J.: This is an appeal from an order of the Divisional Court made on a Case stated by Buckinghamshire justices. I am clearly of opinion that that which has taken place at Bekonscot is "development" within the definition of that term in s. 53 of the Town and Country Planning Act, 1932, and in s. 12 (2) of the Town and Country Planning Act, 1947. To carry the matter a stage further back, that which was done was within the words "the development of estates and building operations" which might be permitted to proceed pending the preparation or adoption and approval of a scheme under s. 45 of the Housing, Town Planning, etc., Act, 1919, and the same words appear in the Town Planning (General Interim Development) Order, 1922, made under the Act. There is no substance in the submission that because this is a model village, or because the buildings are small, neither is, or are, within the planning legislation. The appellants could, had they so desired, have applied to the local authority for permission under the order of 1922, but they did not do so. No material change in this respect was made by the Town Planning Act, 1925.

The more difficult position is that which arises as to buildings, etc., erected after the date (Sept. 24, 1929) of the resolution of the local authority to prepare a town planning scheme and before the coming into force of the Town and Country Planning (General Interim Development) Order, 1933 (S.R. & O., 1933, No. 236). The order of the Divisional Court does not affect buildings or development before the date of the resolution, but under the order development after that date is held to be subject to the powers given by the Town and Country Planning Act, 1947. The earlier Acts envisaged the adoption of a scheme and the payment of compensation to a person whose land was injuriously affected by such a scheme, but compensation was not payable on account of any building erected on land involved in a scheme after the date of the resolution of the local authority to prepare or adopt a scheme: see s. 58 of the Housing, Town Planning, etc., Act, 1909, s. 45 of the Housing, Town Planning, etc., Act, 1919, and sched. III thereto, and s. 10 (2), of the Town Planning Act, 1925. The Town and Country Planning Act, 1932, by s. 10, imposed on the Minister a duty to make a general order with respect to the interim development of land within the areas to which resolutions to prepare or adopt a scheme applied. The order of 1933 followed; it revoked the order of 1922. Article 2 (1) of the order of 1933 takes one back to the date of the resolution of Sept. 24, 1929, for it defines "existing building" as

"a building erected or constructed before the resolution date, and includes a building . . . begun before, but completed after, that date"

and the "resolution date" means the date on which a resolution or an application for authority to prepare or adopt a scheme took effect. Thus, it seems clear that buildings erected after Sept. 24, 1929, but before the coming into force of the Act of 1932 and order of 1933 were not existing buildings for the purpose of the Act and order.

Section 13 of the Act of 1932 gives the responsible authority power to enforce schemes and carry them into effect by removing, pulling down, or altering buildings. Under s. 18 any person whose property was injuriously affected thereby could obtain compensation, but s. 20 (2) provided that such compensation should not be recoverable unless the building, &c., was an existing building. It follows that, if there had been a scheme under the Act of 1932, any building erected without permission after the 1929 resolution could have been pulled down without payment of compensation. There was no scheme, and all this was washed away by the Town and Country Planning Act, 1947, Part III of which deals with control of development. Permission to develop land is required, and ss. 12 to 19 cover that. Section 23 deals with enforcement of planning control after the appointed day, and it is under this section that notices were served, and that the appellants appealed to the court of summary jurisdiction. Section 75 (1) makes this procedure available where any works on land existing at the appointed day were carried out in contravention of previous planning control.

It is claimed on behalf of the appellants that the buildings were not works on land erected in contravention of previous planning control. True, no permission had been asked for or given, and to that extent the appellants were at risk. The planning authority might have taken steps under s. 13 of the Act of 1932 if a scheme had been adopted and approved, and no compensation would have been payable, but the Act of 1932 was repealed by the Act of 1947 and no steps can now be taken under the Act of 1932, it is said.

It becomes necessary to consider s. 75 (9) of the Act of 1947:

"For the purposes of this section, works on land shall be deemed to have been carried out . . . in contravention of previous planning control—(a) where at the material time the land was subject to a resolution to prepare a planning scheme, if carried out or begun otherwise than in accordance with permission granted in that behalf by or under the interim . . . order."

The interim development order here is the order of 1933. I should add that under s. 18 (1) of the Act of 1947 (amplified by s. 75 (4)) the power to grant permission to develop land under Part III includes power to grant permission for the retention on land of any buildings or works constructed or carried out thereon before the date of the application, from which it would seem that the appellants could have applied in respect of the buildings erected between 1929 and 1932.

The question for decision is whether it is shown that such buildings were erected otherwise than in accordance with permission granted under the order of 1933. The answer seems to me to be clear. No permission was asked or given, and, consequently, they were not erected in accordance with permission given under that order. And if I am right in my reading of s. 18 (1) and s. 75 (4) of the Act of 1947, it provides no sort of excuse to say that application could not be made under the order of 1933 for something done before the date of the order (assuming that to be right), for application was possible under s. 18 and s. 75 (4) of the Act of 1947, and, if the application had been successful, no question of enforcement under s. 23 would have arisen. It must not be taken that I agree that no application was possible under art. 5 of the order of 1933 to permit a development of this land merely because some part of the work of development had been commenced or carried out after the date of the resolution and before

the coming into force of the order of 1933—as to which see the transitional provisions in s. 52 (2) of the Act of 1932 and ss. 53 and 54.

The scheme of the town planning legislation is to control planning and development. Under the Act of 1932 and the order of 1933 existing buildings (as defined) are not affected. The definition of existing buildings in the order does not cover buildings erected after the date of the resolution unless they were begun before that date. Under s. 52 (2) of the Act of 1932 the resolution of 1929 is to have effect as if it were a resolution passed by the authority and approved by the Ministry under the Act of 1932. Section 54 repeals the Act of 1925, but nothing in the repeal is to affect any approval or consent given under any enactment repealed, from which it would appear to follow that, if any works were carried out for which permission was given, it could not be said that they were otherwise than in accordance with the order made under the Act of 1932. In my opinion, the works begun after the date of the resolution and before the order of 1933 came into force, were carried out or begun otherwise than in accordance with permission granted in that behalf by or under the interim development order, and this appeal should be dismissed. Buildings begun before the date of the resolution and completed afterwards would, however, appear to fall within the definition of "existing building" in the order.

MORRIS, L.J.: On Sept. 24, 1929, the Beaconsfield urban district council passed a resolution to prepare a town planning scheme for the Beaconsfield urban district. No question is raised in regard to anything which was done at Bekonscot on or before such date. There was then in force the Town Planning (General Interim Development) Order, 1922, which was made by the Minister of Health under s. 45 of the Housing, Town Planning, etc., Act, 1919. Though the Town Planning Act, 1925, repealed that part of the Housing, Town Planning, etc., Act, 1919, which contained s. 45, it was provided by s. 21 (1) of the Act of 1925 that the repeal should not affect any order made under the repealed part of the Act of 1919, and that any order should have effect as if made under the corresponding provision of the Act of 1925. Section 4 of the Act of 1925 contained provisions which corresponded with s. 45 of the Act of 1919. In each section is to be found the phrase "development of estates and building operations". The phrase is, therefore, found in the Town Planning (General Interim Development) Order, 1922. After the passing of the resolution to prepare a town planning scheme it was open to the appellants to apply to the local authority for permission to do any work that would come within the phrase "development of estates and building operations." The work in fact done between the end of September, 1929, and Apr. 1, 1933, consisted, as the justices have found, in completing the village in the south-west of the area, together with the model railway on the land. The justices find that during such period the development had become known as "the Bekonscot Model Village and Railways." On the facts as found, I am of the opinion that the work done during that period would properly fall to be described as being within the phrase "development of estates and building operations." No application for permission was in fact made.

The Town Planning Act, 1925, was repealed by the Town and Country Planning Act, 1932, which came into operation on Apr. 1, 1933. Section 10 (1) of the Act of 1932 is in these terms:

"The Minister shall make a general order with respect to the interim development of land within the areas to which resolutions to prepare or adopt a scheme apply and may make special orders with respect to the interim development of such land in any particular area. For the purposes of this

section the expression 'interim development' means development between the date on which the resolution takes effect, and the date of the coming into operation of the scheme."

"Development" is defined in relation to any land as including any building operations or re-building operations and any use of the land or any building thereon for a purpose which is different from the purpose for which the land or building was last being used. The word "buildings" is defined as including structures and erections, and the phrase "building operations" is defined as including any road works preliminary or incidental to the erection of buildings. In exercise of the powers conferred on him by s. 10 of the Act of 1932 the Minister of Health made the Town and Country Planning (General Interim Development) Order, 1933, which came into force on Apr. 1, 1933. By art. 4 of that order certain development was permitted pending the coming into operation of a scheme. Included in such permitted development were in the case of an existing building: (i) works necessary for the maintenance of the building; and (ii) works of alteration neither affecting the exterior of the building, nor proposed in connection with a different use of the building. An "existing building" was defined as meaning a building erected or constructed before the date on which a resolution or an application for authority to prepare or adopt a scheme took effect. It also included a building erected or constructed in pursuance of a contract made before or begun before, but completed after, the resolution date.

It was found by the justices that small replacements to the model buildings in the village were carried out from time to time. The justices have not specified, however, or have not found what "buildings" were erected or constructed before the date on which the resolution took effect. It will, in my judgment, be necessary to have findings as to this matter. It is to be pointed out that any "buildings" begun before, but completed after, such date, or any "buildings" erected or constructed in pursuance of a contract made before such date, are likewise to be regarded as "existing buildings." The justices found that after Apr. 1, 1933, the railway was extended and further model buildings were erected outside the area of the original village. In my judgment, the railway is either a "structure" or an "erection", and the model buildings are also either structures or erections. Small or model buildings may only be small structures or small erections, but they are, nevertheless, within the definition of the word "buildings".

No application for planning permission was made after Apr. 1, 1933, and, in my judgment, the work done after such date was work for which within the definitions in the Act of 1932 and the General Interim Development Order of 1933 permission might have been sought. By art. 3 of the Town and Country Planning (General Interim Development) Order, 1933, it was provided that the Town Planning (General Interim Development) Order, 1922, was revoked.

Although I have referred to the permissions which the appellants could have sought under the General Interim Development Orders of 1922 and 1933, the matters arising in the present appeal fall to be determined by reference to the construction of s. 75 of the Town and Country Planning Act, 1947. By one part of that Act it was provided that general permission was required in respect of any development of land which was carried out after July 1, 1948. The expression "development" meant (subject to some exceptions) the carrying out of building, engineering, mining or other operations in, on, over or under land or the making of any material change in the use of any buildings or other land. Certain provisions for the enforcement of planning control were embodied in s. 23 of the Act. It was then provided by s. 75 (1) as follows:

"Where any works on land existing at the appointed day were carried out, or any use to which land is put on that day was begun, in contravention of previous planning control, then, subject to the provisions of this section, the provisions of Part III of this Act with respect to enforcement notices shall apply in relation thereto as they apply in relation to development carried out after the appointed day without the grant of permission in that behalf under the said Part III: Provided that an enforcement notice shall not be served by virtue of the provisions of this section in respect of any works or use (not being works or a use carried out or begun during the war period as defined by the Building Restrictions (War-Time Contraventions) Act, 1946) at any time after three years from the appointed day."

The notice which was served on Oct. 24, 1950, by the Buckinghamshire County Council (who were then the local planning authority) on the appellants was served in reliance on the provisions of s. 75 of the Act of 1947. The planning authority must show that any "works on land" or any user, to which they take exception, were carried out or begun in contravention of previous planning control. There is no definition in the Act of the phrase "works on land". The notice served on the appellants shows that the county council adopted the language of the definition of "development" contained in the Act of 1947. The notice began with the words following:

"Take notice that the county council of the administrative county of Buckingham, as the local planning authority, in pursuance of their powers under s. 23 of the Town and Country Planning Act, 1947, hereby declare that the development specified in the first column of the schedule hereto had been carried out in contravention of previous planning control as defined in s. 75 of the said Act."

The notice then required that the steps should be taken which were set out in the second column of the schedule. The schedule was as follows:

"Development. (1) Use of land lying between Warwick Road and Lethborough Lane in the urban district of Beaconsfield in the county of Buckingham for purposes other than the curtilage of a private dwelling-house namely for the purpose of a public exhibition known as Bekonscot Model Village. Steps required to be taken: Discontinuance."

Then:

"Development: (2) Building, engineering and other operations in and on land lying between Warwick Road and Lethborough Lane in the urban district of Beaconsfield in the county of Buckingham comprising Bekonscot Model Village. Steps required to be taken: Demolition and/or removal."

It will be seen that the heading of column 1 was "development", and that under item no. 2 the words employed are words taken from the definition of "development" which is contained in the Act of 1947.

The justices held that by August, 1929, the general lay-out of the model village and railway and of the garden had been fixed, and the user of the area for its present user had been established. Because of the findings of the justices the county council did not contend before the Divisional Court that there should be discontinuance so far as user was concerned. They did not, therefore, rely on item 1 of the schedule. That was for the reason that on the findings of the justices the change of user was begun before the date of the resolution to prepare a scheme. Similarly, in relation to item 2, the county council did not call for any demolition or removal of any building, engineering or other operations which

had been carried out before the resolution date. The appeal of the county council before the Divisional Court, which appeal succeeded, proceeded effectively only in relation to any building, engineering or other operations which had been carried out since the end of September, 1929.

It may seem somewhat incongruous that the county council should abandon complaint in regard to user of land for the purpose of a public exhibition known as Bekonscot Model Village, but should still proceed with a demand for the demolition or removal of some of the buildings which have for years been publicly exhibited as and have become known as Bekonscot Model Village. It is found by the justices that since as long ago as August, 1929, members of the public have been admitted to the area, and that by Apr. 1, 1933, the model village was substantially completed. But the task of the court can only be to decide whether the county council has been endowed with "a giant's strength". The court has not got the material before it to decide whether "it is tyrannous to use it like a giant". In my judgment, the work done by the appellants subsequently to the resolution clearly came within the words "works on land". It is not necessary to seek to define the phrase or to relate it to any statutory definitions, for I consider that the work done by the appellants came within the phrase "development of estates and building operations" as well as within the word "development" either with its meaning under the Act of 1932 or with its meaning under s. 12 (2) of the Act of 1947.

The inquiry next becomes whether the "works on land" were carried out "in contravention of previous planning control". In this connection it becomes necessary to consider s. 75 (9) which is in the following terms:

"For the purposes of this section, works on land shall be deemed to have been carried out, and uses of land to have been begun, in contravention of previous planning control—(a) where at the material time the land was subject to a resolution to prepare a planning scheme, if carried out or begun otherwise than in accordance with permission granted in that behalf by or under the interim development order; (b) where at the material time the land was subject to a planning scheme, if carried out or begun otherwise than in conformity with the provisions of the scheme or of permission granted thereunder; and where permission for any works or use was granted as aforesaid subject to conditions (in whatever form) restricting the period during which the works or use could be continued on the land, and that period has expired before the appointed day, the provisions of this section shall apply as if the works or use had been carried out or begun in contravention of previous planning control."

The words "interim development order" are defined in the Act to mean an order made under s. 10 (1) of the Act of 1932. If the definition of "interim development order" had included the General Development Order of 1922, then, once it is held that what the appellants did after Sept. 30, 1929, comes within the words "works on land", the appellants would be without argument. Such works would have been carried out otherwise than in accordance with permission granted under the Interim Development Orders of 1922 and 1933, for the appellants neither sought nor obtained permission. The question arises whether the appellants are better placed because s. 75 (9) refers only to the General Interim Development Order of 1933. In my judgment, they are not. The appellants carried out "works on land". The question must then be posed whether such works were carried out otherwise than in accordance with permission granted under the order of 1933. As there was no permission granted under the order of 1933, then, in my judgment, it follows that the works were

otherwise than in accordance with permission granted under that order. It is said that the words should be read as referable only to the period subsequent to the order of 1933, for it is rightly said that permission under that order could only be obtained after the date of the order. But the words of the sub-section are not limited. Certain works on land are "to be deemed" to have been "in contravention of previous planning control". This choice of language was probably employed for the reason that under the Acts of 1919, 1925 and 1932 developers were not under compulsion of applying for interim development permission; they merely ran certain risks for the future if they proceeded to develop without having secured permission. It was, consequently, enacted by s. 75 (9) that certain works on land should be deemed to have been begun "in contravention of previous planning control". The works were so to have been deemed if they were begun otherwise than in accordance with permission granted under the order of 1933. The words, in my judgment, are wide enough and are apt to cover works carried out after the date of a resolution to prepare a planning scheme, but before as well as after the date of the order of 1933. Parliament has in effect enacted that, unless there was permission under the order of 1933, then works, excluding always anything coming within the definition of "existing buildings", subsequent to a resolution to prepare a scheme should be deemed to have been carried out in contravention of previous planning control. If in some case permission had, in fact, been given under the order of 1922, then, in the unlikely event of a suggestion being made that the words of s. 75 (9) would, nevertheless, apply, the effect of s. 54 of the Act of 1932 and of s. 113 of the Act of 1947 dealing with repeals and of certain other provisions would have to be considered. It may be that a permission given under the order of 1922 would be treated as a permission given under the order of 1933, but this matter does not call for decision, and I express no opinion on it.

I can see no escape from the applicability of s. 75 (9) to the present case, and the "works on land" which were carried out after the resolution took effect were carried out other than in accordance with permission granted in that behalf by or under an order made under s. 10 (1) of the Act of 1932. There is no proviso to, or limitation of, the relevant words of s. 75 (9) of the Act of 1947, and the result follows that, as the appellants' land was subject to a resolution to prepare a planning scheme, and as "works" were carried out on the land after such resolution, and as no permission for the carrying out of such works was granted under the General Interim Development Order of 1933, the works on land, save so far as they might be within the definition of "existing buildings", must be "deemed" to have been carried out in contravention of previous planning control for the purposes of s. 75 (1) of the Act. I, therefore, reach the conclusion that the judgment of the Divisional Court was correct, and that the results must follow which were consequent on this view.

LLOYD-JACOB, J.: By this appeal the appellants seek to maintain that part of an order made by the Beaconsfield justices on Mar. 9, 1951, which, by an order of the King's Bench Divisional Court dated Oct. 12, 1951, was directed to be reversed. The part of the order in question concerned an enforcement notice dated Oct. 24, 1950, duly served by the county council on the appellants wherein demolition and/or removal was required in respect of

"building, engineering and other operations in and on land lying between Warwick Road (sic) and Lethborough Lane in the urban district of Beaconsfield in the county of Buckingham comprising Bekonscot Model Village."

After the hearing before the justices, this enforcement notice was directed to be quashed both in respect of the demolition and removal as well as of the requested discontinuance of user of the site, which latter was not the subject of appeal.

The Case stated by the justices sets out their findings of fact, from which the following are extracted: (i) In September, 1929, a resolution to prepare a town planning scheme for the district was duly passed and entered on the register of local land charges. (ii) Prior to this date the following building, engineering and other operations had been commenced: (a) the construction of a pond, banks and rockeries; (b) foundations for a model railway; (c) erection of model buildings including church, school, post office and council offices. (iii) Prior to this date, the following had been completed: (a) The area of development had been delineated as comprising an area within the blue line on the plan and the general lay-out of the model village and railway within the red line and of the garden within the blue line had been fixed; (b) the public had been admitted on payment. (iv) Subsequent to the said date, but prior to Apr. 1, 1933, the following had been completed: (a), (b) and (c) above so far as they were situate within the red line on the plan. (v) Subsequent to Apr. 1, 1933, the railway was extended and model buildings erected outside the red line, but within the blue line on the plan. (vi) The model buildings above referred to are representative of those found in a village or town, constructed in the main of stone or brick on a concrete foundation to a scale of one inch to the foot. The justices concluded that the works complained of were not works to which s. 75 of the Town and Country Planning Act, 1947, applied, and they proceeded under s. 23 (4) (a) and s. 75 (5) of that Act to quash the notice. On appeal the Divisional Court held that s. 75 of the Act of 1947 did apply to all the structures on this site erected after Sept. 30, 1929, and it is from that finding that the present appeal is brought.

The material portions of s. 75 are as follows. Sub-section (1): "... in contravention of previous planning control . . . " This phrase is not a term of art, and its definition follows in sub-s. (9).

"For the purposes of this section, works on land shall be deemed to have been carried out . . . in contravention of previous planning control—
(a) where *at the material time* the land was subject to a resolution to prepare a planning scheme, if carried out or begun otherwise than in accordance with permission granted in that behalf by or under the interim development order "

which order, by s. 119 (1), means an order made under s. 10 (1) of the Act of 1932.

At the time when the appellants commenced the development of the Bekonscot Model Village and the building operations which were comprised in that development, the provisions of the Town Planning Act, 1925, had not been made to apply to the area. There was, therefore, no planning control in operation to which they had any occasion to conform. The resolution to prepare a town planning scheme passed in September, 1929, brought into operation the provisions of the Act of 1925, whereby the opportunity to seek and obtain permission for further development under the order of 1922 was provided, an opportunity of which the occupiers did not choose to avail themselves. By s. 10 (2) any works, other than those approved under an interim development order, if carried out after the date of the resolution, were excluded from compensation should the powers in s. 7 to remove or alter them be exercised when the planning scheme was ultimately approved and adopted, but by proviso (a) to sub-s. (2) there is a special saving for work done or buildings finished if begun or contracted for earlier than the relative operative date, which for present purposes is the

date of the resolution. Having regard to the findings of the justices, this would preserve to the appellants a right of compensation in respect of items (a), (b) and (c) above so far as the same were carried out before the date of the resolution and make it necessary for them to seek any permission by way of interim development order to carry out such completion. This completion could not, therefore, have been in contravention of previous planning control, for it was impliedly authorised by the then operative statute under which planning was controlled.

The extension of the railway and the erection of model buildings, if, as is plainly the case, these constitute development within the definition contained in s. 53 of the Town and Country Planning Act, 1932, were such as to require permission under an interim development order if they were not to be at risk of demolition or alteration without compensation should a scheme which did not include them be ultimately approved by the Minister. This construction and erection, therefore, contravened planning control in the sense that it did not accord with the plans envisaged for ultimate adoption in respect of the locality, but no effective steps to remedy the contravention could be taken by the local authority until the planning scheme received the Minister's approval. This position continued until the Act of 1947 came into operation, which swept away this barrier and provided by s. 23 for enforcement of planning control from the appointed day. Section 75 (1) made the procedure for enforcement operative in respect of antecedent works if they were carried out in contravention of previous planning control, and s. 75 (9) defines such contravention. Two things require to be established: (a) that the land in question was subject to a resolution to prepare a planning scheme; (b) that the works do not conform with permission granted under the order of 1933. The appellants do not question the facts, and both requirements have been established. The extended buildings and erections must, accordingly, be held to be a contravention of previous planning control, and are, therefore, appropriate for condemnation under the enforcement notice.

The consequence of these conclusions may appear unfortunate, in that the continued user of the area for exhibition purposes is no longer challenged and the right to continue to use the buildings in question for such purposes cannot be assailed. The mutilation of the present lay-out by destruction of the remainder would appear to serve no useful purposes to anyone. This, however cogent for consideration by the Minister, is not a matter which concerns the court. In my judgment, therefore, in the result the order of the Divisional Court should be varied by excluding from the remitted matter any work done or buildings finished after Oct. 1, 1929, which had been begun or contracted for before that date.

Appeal dismissed.

Solicitors: *Callingham, Griffith & Bate* (for the appellants); *Sharpe, Pritchard & Co.*, agents for *G. R. Crouch*, clerk of Buckinghamshire County Council (for the county council).

C.N.B.

PROBATE, DIVORCE AND ADMIRALTY DIVISION

(LORD MERRIMAN, P., AND PEARCE, J.)

Apr. 23, 1952

CHILTON v. CHILTON

Justices—Maintenance order—Wilful neglect to maintain—Reasonable and honest belief of wife's adultery.

As a result of quarrels over the wife's relationship with another man, the husband turned the wife out of the matrimonial home. On the wife's summonses against the husband charging him with desertion and wilful neglect to provide her with reasonable maintenance,

HELD: the husband's bona fide belief, induced by the wife, that she had committed adultery was a good defence, not only to the charge of desertion, but also to the charge of wilful neglect to maintain.

Morris v. Edmonds (1897) (77 L.T. 56) and *Glenister v. Glenister* (1945) (109 J.P. 194), applied.

APPEAL by the husband against a decision of Barrow-in-Furness, Lancashire, justices whereby they found him guilty of wilful neglect to provide reasonable maintenance for his wife. At the same time and on the same facts they dismissed a summons by the wife alleging that the husband had also been guilty of desertion on the ground that on that part of the case they were bound by the decision in *Glenister v. Glenister* (1).

John Latey for the husband.

A. R. Ellis for the wife.

LORD MERRIMAN, P.: This is an appeal by a husband against a decision of the justices for the Barrow-in-Furness petty sessional division of Lancashire given on Dec. 21, 1951, whereby they found him guilty of wilful neglect to provide reasonable maintenance for his wife. On that finding they made an order for 10s. a week, which, so far as amount is concerned, is not challenged. At the same time they dismissed the wife's charge, in respect of the same circumstances, that the husband had deserted her. The sole question in this case, therefore, is whether the finding of wilful neglect to provide reasonable maintenance can stand.

The case raises the question whether or not the principles on which *Glenister v. Glenister* (1) was decided apply, not only to a charge of desertion, but also to one of wilful neglect to maintain. Having regard to the helpful way in which this case has been presented to us on both sides, it is not necessary to go into an elaborate review of the facts. The husband resisted the summonses on the ground that his wife had committed adultery, though it is conceded that no formal charge had been made to that effect and she had been given no formal notice of the charge. The case was fought on the basis that, whether, in fact, she had committed adultery or not, by her conduct she had induced a reasonable belief in the husband's mind that she had done so, and I propose to deal with the case on that basis. The justices have found that there was not sufficient evidence that the wife had committed adultery, and I see no reason whatever for interfering with that finding. On the other hand, it is agreed by both counsel that the case, at any rate so far as desertion was concerned, came within the *Glenister v. Glenister* (1) principle, namely, that she had induced a reasonable belief in the husband's mind that she had committed adultery. On that they found that the husband, who had, in effect, turned her out of the matrimonial home as the

(1) 109 J.P. 194; [1945] 1 All E.R. 513; [1945] P. 30.

result of a quarrel over her supposed relationship with a certain man, was not guilty of desertion without reasonable cause, but at the same time they held that the conduct of the wife was not such as to absolve the husband from his liability to maintain her, and, therefore, that he was not justified in refusing to provide reasonable maintenance for her. Accordingly, they dismissed the one summons and found the other proved. It is also agreed that this case must be judged as things stood at the time when the summonses came before the justices and before they had found that there was not sufficient evidence of adultery having been committed. Both counsel, I think rightly, have pressed us to decide the question as a strict matter of law on the facts which I have outlined and not to be diverted from doing so by the possibility that the very finding itself may or may not render the question of the husband's liability to maintain his wife for the future purely academic.

Before I examine the law I must mention one other circumstance. I am satisfied that the justices were entitled to hold that as regards the charge of desertion this case was governed by *Glenister v. Glenister* (1), and to direct themselves accordingly. Without an elaborate examination of the evidence, I think it is sufficient to say that it is plain that to the knowledge of the husband and in defiance of his wishes the wife had been associating with the man in question and that when the last quarrel took place about this association she assumed a thoroughly defiant attitude. She threw what turned out eventually to be merely a pay-packet at him, saying: "There is the evidence you want—French letters". Not only so, but when he suggested a reconciliation she said that she intended to go away with this man, and she also admitted that she had confessed what she was pleased to call her "guilt" to his son, though she tried in the witness box to qualify that by saying that that only meant guilt in associating with him and not guilt in committing adultery. I think it is unnecessary to say more than that the evidence does clearly show this to be the class of case in which by her own conduct the wife deliberately induced in the husband's mind the belief in her guilt.

The question is whether, in spite of their correct decision about desertion the justices were entitled to hold on the same set of circumstances that the husband wilfully neglected to provide reasonable maintenance for his wife. It is true that so far as the Summary Jurisdiction (Married Women) statutory code is concerned, all the decisions on this point relate to the offence of desertion and none of them to wilful neglect to maintain, but I have had some difficulty in understanding why, in circumstances such as those prevailing in this case, there should be thought to be any logical distinction between the two. It is not, as was at one time suggested in argument, a question whether reasonable belief in the wife's having committed adultery absolves the husband for all time from maintaining his wife, but whether, during a period when the husband reasonably holds the belief in his wife's adultery which has been induced, and, as in this case, deliberately induced, by her own conduct, he can be charged with wilful neglect to maintain her.

I do not propose to review all the authorities. I think it is sufficient for our purposes to say that *Glenister v. Glenister* (1) has now been dealt with twice in the Court of Appeal, once—(I have to utter the caution)—by the author of the original judgment presiding in the Court of Appeal in *Everitt v. Everitt* (2). In *Allen v. Allen* (3) HODSON, L.J., said:

"*Glenister v. Glenister* (1) was referred to by LORD MERRIMAN, P., sitting

(1) 109 J.P. 194; [1945] 1 All E.R. 513; [1945] P. 30.

(2) 113 J.P. 279; [1949] 1 All E.R. 908; [1949] P. 374.

(3) 115 J.P. 229; [1951] 1 All E.R. 724.

as President of a division of this court in *Everitt v. Everitt* (1), and he there emphasised what is, in my judgment, an essential feature of the defence which the husband sought to raise in the present case, namely, its temporary nature, because, although at one moment a person may be able to say that he or she reasonably believes in a state of facts, that reasonable belief may be dispelled at any moment. Nobody could give an exhaustive statement of the ways in which a belief could be dispelled. The question in issue in the present case is whether the husband's belief must be taken to have been dispelled when a judgment of a court of competent jurisdiction has been given in favour of the wife to the effect that the husband has failed to prove a charge of adultery against her."

That is the case as it stands now, but it was not the case as it stood before the justices gave their judgment. Then HODSON, L.J., refers to my judgment in *Everitt v. Everitt* (1) and quotes from it one passage which I shall not cite again.

In the judgment in *Glenister v. Glenister* (2) I am reported as having said:

"That brings me to the only remaining point, which is the real crux of this case: Whether, short of proving adultery against the wife, the husband has nevertheless shown and ought to be held to have shown that he had reasonable cause for withdrawing from cohabitation in the sense that he was not a deserter . . . That the husband held that belief, and held it reasonably, I am prepared to hold in his favour. There remains the sole question whether that is enough. My own impression is that there is authority on the question of reasonable belief of adultery, but I cannot put my hand on it, and counsel have not been able to refer us to it, but the principle, I think, is really settled by two cases."

I then refer to *Haswell v. Haswell & Sanderson* (3) and *Ousey v. Ousey & Atkinson* (4) and I do not propose to refer to them again, but I am now able to say that I know what were the cases the names of which I was trying to recall. They were *Morris v. Edmonds* (5), and *Biggs v. Burridge* (6), the latter of which approves, but distinguishes, *Morris v. Edmonds* (5). I think it is only necessary to refer to *Morris v. Edmonds* (5), and I do so because, although it was decided under the Vagrancy Act, in substance it raises exactly the point which is said to be left undecided by *Glenister v. Glenister* (2) and all the other cases in which *Glenister v. Glenister* (2) has been followed. In *Morris v. Edmonds* (5) the head-note reads as follows:

"The respondent . . . was charged under s. 3 of the Vagrancy Act, 1824, for that he, being able to work and maintain himself and his wife and family, 'wilfully refused or neglected' to do so. The magistrates found that he refused to maintain his wife because of the bona fide belief that she had committed adultery, and that he had offered under certain conditions to support his children. They dismissed the summons, holding that under these circumstances . . . the respondent, had not 'wilfully refused or neglected'. Held, that the magistrates were right."

The Vagrancy Act, in common with s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, imports the element of wilfulness. It might be well just to

(1) 113 J.P. 279; [1949] 1 All E.R. 908; [1949] P. 374.

(2) 109 J.P. 194; [1945] 1 All E.R. 513; [1945] P. 30.

(3) (1859), 23 J.P. 825; 1 Sw. & Tr. 502.

(4) (1874), L.R. 3 P. & D. 223; (1875), 1 P.D. 56.

(5) (1897), 77 L.T. 56.

(6) (1924), 89 J.P. 75.

read one paragraph in the Case stated by the magistrates for the Queen's Bench Divisional Court:

"Upon the facts hereinbefore stated we decided that this was a case of bona fide mutual separation by deed, and that the respondent had at the time of separation made provision for his wife and her children, and had ceased to pay her in consequence of a bona fide belief that she had committed adultery, and that the respondent had not within the true meaning and intent of the Vagrancy Act wilfully refused or neglected to maintain his wife and children, and that he therefore was not guilty of the offence charged against him by the summons, which we therefore dismissed."

It was argued that while the committal of adultery had been held to be a defence, there was no direct authority that bona fide belief of adultery amounted to a defence. The court consisted of COLLINS, J., and RIDLEY, J., and the judgment was delivered by COLLINS, J., who said:

"I am of opinion that we ought not to interfere with the discretion of the magistrates. They heard and saw the parties, and came to a conclusion that this was bona fide. I was impressed at one time with the distinction of the fact of adultery, and the bona fide belief of adultery, but this is a proceeding not to enforce maintenance, but a penal proceeding for an offence, and so we must look and see if the respondent has 'wilfully' refused to maintain. The authorities quoted establish that under the circumstances of this case, the man cannot be described as an idle and disorderly person. I think the decision of the magistrates perfectly right, and this appeal must be dismissed."

I agree that that is not directly in point because of such distinction as there is between the provisions of the Vagrancy Act and those of the Summary Jurisdiction (Married Women) Acts, but it seems to me to be a very strong indication, even if there were no other, to what our decision ought to be in regard to this charge of wilful neglect to provide reasonable maintenance. But for my part, I think that in the circumstances of this case it is impossible to draw any sensible distinction between the application of the principle in *Glenister v. Glenister* (1) and the cases which followed and approved it to the charge of desertion and the application of that principle to the charge of wilful neglect to maintain. I think, therefore, that, though the findings of fact on the justices' part are unimpeachable, they have misdirected themselves in the application of the law to those facts in respect of the summons for wilful neglect, and that the appeal must, therefore, be allowed.

PEARCE, J.: I agree. The principle laid down in *Glenister v. Glenister* (1) is decisive of this case. In view of the circumstances which led the justices, quite rightly, to dismiss the summons for desertion, it was not possible for them properly to find that there had been wilful neglect to maintain. Unless there is some agreement, made expressly or by implication between the parties, the duty to cohabit and the duty to maintain are co-extensive, and, in my opinion, where circumstances have excused the husband from his duty to cohabit he cannot be held guilty of wilful neglect to maintain.

Appeal allowed.

Solicitors: *Baylis, Pearce & Co.* (for the husband); *Bell, Brodrick & Gray* (for the wife). G.F.L.B.

(1) 109 J.P. 194; [1945] 1 All E.R. 513; [1945] P. 30.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., OLIVER AND BYRNE, JJ.)

April 24, 1952

BLENKIN v. BELL

Road Traffic—Speed limit—Shooting-brake—Private carrier's "C" licence—Use at time solely for carrying passengers—Road and Rail Traffic Act, 1933 (23 & 24 Geo. 5, c. 53), s. 9 (2).

The driver of a shooting-brake was charged with driving the vehicle at a speed greater than the speed specified in sched. I to the Road Traffic Act, 1934, as the maximum speed for a vehicle of that class or description, contrary to s. 10 of the Road Traffic Act, 1930 (as amended by s. 2 (2) of the Act of 1934). The driver held a private carrier's "C" licence in respect of the vehicle, which was driven by him on a non-restricted road at a speed exceeding thirty miles an hour. The vehicle was sometimes used for carrying goods, but at the time of the alleged offence it was being used solely for the carriage of passengers. The justices held that the vehicle was not subject to the thirty miles an hour speed limit, and dismissed the information.

HELD: that their decision was right, as the effect of s. 9 (2) of the Road and Rail Traffic Act, 1933, was that the conditions of the private carrier's licence did not apply to a vehicle which could be used for carrying either passengers or goods when it was in fact carrying passengers only.

Hubbard v. Messenger (1937) (101 J.P. 533), distinguished.

CASE STATED by Durham justices.

At a court of summary jurisdiction sitting at Durham on Oct. 3, 1951, an information was preferred by the appellant Blenkin, a superintendent of police, charging that the respondent Bell unlawfully drove a motor vehicle at a speed greater than thirty miles an hour, the speed specified in sched. I to the Road Traffic Act, 1934, as the maximum speed in relation to a vehicle of that class or description, contrary to s. 10 of the Road Traffic Act, 1930, as amended by s. 2 (2) of the Act of 1934. It was proved or admitted that at the material time the respondent was driving at a speed of over thirty miles an hour. He held a "C" private carrier's licence in respect of the vehicle, which was a shooting brake or utility van. It was equipped with pneumatic tyres and weighed less than three tons. Sometimes it was used for carrying goods, but at the time of the alleged offence it was being used solely for the carriage of passengers. The vehicle had in addition to the front doors a rear door on either side and a door at the back, and contained a seat for one passenger beside the driver and two rear seats for passengers. The rear seats were fixed to the floor by screws and bolts.

It was contended for the appellant that the vehicle was a goods vehicle licensed under a "C" licence and subject to the speed limit of thirty miles per hour, and that the Motor Vehicles (Variation of Speed Limit) Regulations, 1950, did not except the vehicle from that speed limit. It was contended for the respondent that at the material time the vehicle was not a goods vehicle, but a passenger vehicle, and that it was not subject to the speed limit merely by virtue of the "C" licence. The justices were of the opinion that at the material time the vehicle was not being used under the authority of the licence, but as a private car carrying passengers, and was, therefore, not subject to the thirty miles speed limit. The information was dismissed and the appellant appealed.

D. H. Robson for the appellant.

Skelhorn for the respondent.

LORD GODDARD, C.J.: This is a Case stated by justices for the county of Durham before whom the respondent was charged with unlawfully driving

a motor vehicle at a speed greater than thirty miles an hour, the speed specified in sched. I to the Road Traffic Act, 1934, as the maximum speed in relation to a vehicle of that class or description, contrary to s. 10 of the Road Traffic Act, 1930. The point for decision is whether or not the vehicle in question was to be regarded as a goods vehicle. The vehicle, as found by the justices, was a shooting brake or utility van, a class of vehicle considered by the court in *Hubbard v. Messenger* (1). Although counsel for the respondent has said that, in view of the make and construction of the vehicle, the present case should be distinguished from *Hubbard v. Messenger* (1), the court is giving its decision on the footing that this utility truck was of the same class and description as the vehicle in *Hubbard v. Messenger* (1). We are doing that without prejudice to the contention that the cases can be distinguished—in other words, we are going to decide this case on the ground that the vehicle could be described, at any rate when it was carrying goods, as a goods vehicle and not as a passenger vehicle, which means a vehicle constructed solely for the carriage of passengers and their effects.

The Road Traffic Act, 1930, removed a speed limit for a passenger vehicle, provided it was a passenger vehicle adapted to carry not more than seven passengers and was not a heavy motor car or invalid carriage. Schedule I, which dealt with limits of speed, provided by para. 2:

"Goods vehicles, that is to say vehicles constructed or adapted for use for the conveyance of goods or burden of any description:—(1) When not drawing a trailer—(a) Motor cars, if all the wheels are fitted with pneumatic tyres; and (b) Heavy motor cars, constructed or adapted for the conveyance of horses and their attendants and used solely for that purpose, if all the wheels are fitted with pneumatic tyres—thirty miles per hour."

The Road and Rail Traffic Act, 1933, s. 1, set up a system of licensing for goods vehicles, and there were various forms of licences known as public carriers' licences, limited carriers' licences, and private carriers' licences, one or the other of which had to be taken out to enable a goods vehicle to operate on the road. A private carrier's licence is referred to in the Act as a "C" licence.

The vehicle with which we are now dealing had a "C" licence. Section 8 (1) of the Act of 1933 provides:

"It shall be a condition of every licence . . . (b) that any provisions (whether contained in any statute or in any statutory rules or orders) with respect to limits of speed and weight, laden and unladen, and the loading of goods vehicles, are complied with in relation to the authorised vehicles."

Observe the use of the words "authorised vehicles" there. Under s. 8 (1) it is perfectly clear that every licence which is granted to a goods vehicle under the provisions of the Act—including a "C" licence—contains, or must be deemed to contain, a provision that the vehicle must not be driven on the roads at more than thirty miles an hour. By s. 9:

"(1) Subject to the provisions of this section, any person who fails to comply with any condition of a licence held by him, shall be guilty of an offence under this Part of this Act. (2) Notwithstanding that a vehicle is an authorised vehicle, the conditions of the licence shall not apply while the vehicle is being used for any purpose for which it might lawfully be used without the authority of a licence."

The effect of that sub-section seems to be perfectly clear. A vehicle with a "C" licence must be deemed to have a condition attached to it that it shall only be

(1) 101 J.P. 533; [1937] 4 All E.R. 48; [1938] 1 K.B. 300.

driven at thirty miles an hour, but, if it is not being used as a goods vehicle, the condition shall not apply while it is being used for any purpose for which it might lawfully be used without the authority of a licence—in other words, if it is being used as a passenger-carrying vehicle and not as a goods vehicle no licence is required and so the conditions of the licence will not apply. In the Road Traffic Act, 1934, sched. I, para. 2, goods vehicles are defined in this way:

“ . . . vehicles constructed or adapted for use for the conveyance of goods or burden of any description.”

and it is provided that such goods vehicles must not be driven at more than thirty miles an hour.

No doubt owing to the fact that there had been many prosecutions and a certain amount of dissatisfaction with regard to the use of shooting brakes, the Minister made the Motor Vehicles (Variation of Speed Limit) Regulations, 1950, the effect of which was to substitute amended provisions for those in para. 2 of sched. I to the Act of 1934, and as a result the Act of 1934 must be read as prescribing a speed of thirty miles an hour for goods vehicles

“ . . . which are authorised to be used under a licence granted under Part I of the Road and Rail Traffic Act, 1933 . . . ”

In my opinion, the answer to this case is to be found in s. 9 (2) of the Road and Rail Traffic Act, 1933, which provides that, if the vehicle is not being used for the purpose of carrying goods or burden, it is not to be limited in the way that s. 8 would limit it. I can find no indication that the Road Traffic Act, 1934, is intended to repeal s. 8 or s. 9 of the Act of 1933, and it seems to me that the construction I have mentioned is consonant with reason and common sense. If a vehicle can be used for carrying either passengers or goods, and it is being used for carrying goods, as distinct from passengers' luggage, it requires a licence and certain restrictions are placed on its use on the road. If it were not used as a goods vehicle, it would not require a licence, and the speed limit is only applicable when it is carrying goods. In *Hubbard v. Messenger* (1) the point did not arise because there the vehicle was carrying goods and was restricted to thirty miles an hour. In my opinion, the justices came to a right decision.

OLIVER, J.: I agree.

BYRNE, J.: I agree.

Appeal dismissed.

Solicitors: *Theodore Goddard & Co. and Deacons & Pritchards*, agents for *Swinburne & Jackson*, Durham (for the appellant); *A. J. A. Hanhart*, agents for *Hadaway & Hadaway*, Newcastle-upon-Tyne (for the respondent).

T.R.F.B.

(1) 101 J.P. 533; [1937] 4 All E.R. 48; [1938] 1 K.B. 300.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., OLIVER AND BYRNE, JJ.)

April 24, 1952

PAGET PUBLICATIONS, LTD. v. WATSON

Obscene Publication—Order for destruction—Illustrations on insides of covers obscene—Contents not obscene—Order for destruction of whole publication—Obscene Publications Act, 1857 (20 & 21 Vict., c. 83), s. 1.

Copies of a publication were seized under a warrant issued under s. 1 of the Obscene Publications Act, 1857, and the publishers were summoned to show cause why they should not be destroyed. The magistrate who heard the summons found that the only obscene parts of the publication were illustrations on the insides of the covers. Overruling a submission made on behalf of the publishers that in the circumstances there was no power to order the destruction of the whole publication, he ordered the destruction of the whole.

HELD: that a publication was an obscene publication if only a part of it was obscene, and that the magistrate's order was, therefore, right.

CASE STATED by a metropolitan magistrate.

At a court of summary jurisdiction sitting at the West London Magistrate's Court, on the complaint of the respondent, Watson, a police officer, a warrant was issued under the Obscene Publications Act, 1857, s. 1, and thirteen thousand copies of a book called "Slick Bedtime Stories" were brought before the court, whereupon a summons was issued to the appellants, Paget Publications, Ltd., as publishers of the book, to show cause why the said books should not be destroyed. For the respondent it was contended that the publication was obscene and an order for its destruction should be made, and that the court had no power to order the destruction of only the covers of the publication, but that the entire books must be destroyed. It was contended for the appellants that the publication was not obscene, and that, if the court found that the illustrations which formed part of the covers were obscene, but not the remainder of the publication, an order should be made for the destruction of the covers alone. The appellants offered to give an undertaking to remove the covers of the books and destroy them before the books were removed from the custody of the court. The magistrate was of the opinion that the illustrations inside the covers of the publication were obscene, that the outside of the covers and the contents of the books were not obscene, that the books constituted articles which were not capable in law of being divided into separate components, that, unless he followed the "all or nothing" principle, he would be acting as a censor, that censorship of parts or passages of publications was not a function of the court under the Act of 1857, and that the appellants had not shown cause in law why an order should not be made for the destruction of the whole books, and, he, therefore, made an order for their destruction.

Hanlon for the appellants.

M. J. H. Turner for the respondent.

LORD GODDARD, C.J.: A warrant was issued under the Obscene Publications Act, 1857, authorising the police to seize certain books, namely, thirteen thousand copies of a publication called "Slick Bedtime Stories" and to have the publishers brought before the magistrate to show cause why the books should not be destroyed. The magistrate held that the illustrations inside both the back and the front of the cover were obscene. It is not for this court to consider whether he was right or wrong in that respect. If we had to consider it, we should say that undoubtedly, he was right. The magistrate has also held that the

contents of the books were not obscene. If it was for this court to decide whether he was right or wrong about that, this court would have said he was wrong. We have seen sufficient of the contents to appreciate that the contents are grossly obscene in places, but we are only dealing with the cover.

It is suggested that the magistrate had no power to order the destruction of the whole of each book, and that he ought to have ordered the destruction of only the cover. The question raised by the Case Stated is whether the magistrate had power to make the order which he did make. In the opinion of the court, this point is unarguable. It is not necessary to show that a publication is obscene on every page. A publication may be obscene because part of it is obscene. Very few publications can be said to be obscene on every page, but this is an obscene publication, and, in those circumstances it is to be destroyed. It was not for the magistrate to go through the book page by page. In my opinion, his order was perfectly right, and the appeal is dismissed with costs.

OLIVER, J.: I agree. There was abundant evidence on which the magistrate could find that this was an obscene publication, and, therefore, it should be destroyed.

BYRNE, J.: I agree.

Appeal dismissed.

Solicitors: *Brandon & Nicholson* (for the appellants); *Director of Public Prosecutions* (for the respondent).

T.R.F.B.

QUEEN'S BENCH DIVISION

(PARKER, J.)

April 28, 29, 1952

HANILY v. MINISTER OF LOCAL GOVERNMENT & PLANNING AND ANOTHER

Compulsory Purchase—Building land—Compulsory purchase by Central Land Board—Power of board to acquire land for disposal for permitted development—"Development for which permission has been granted"—Valid permission not obtained before purchase and confirmation orders—Owner unwilling to sell at existing use value—Acceptance of offer from prospective purchaser at owner's price—Function of board to prevent sales for more than existing use value—Town and Country Planning Act, 1947 (10 and 11 Geo. 6, c. 51), s. 43 (1) (2).

Town and Country Planning—Permission for development—Person hoping to acquire interest in the land—Obligation of authority to notify owner of application—Town and Country Planning Act, 1947 (10 and 11 Geo. 6, c. 51), s. 14 (1).

Manufacturers obtained from a local planning authority permission to develop a piece of land by erecting a factory thereon, without informing the owner of the land who was offering it for sale. They then offered to buy the land at a price of £400 to £450, which was based on its existing use value, and, on the owner's refusing to accept less than £2,100, they, in effect, requested the Central Land Board to exercise their powers of purchase under s. 43 (1) and (2) of the Town and Country Planning Act, 1947. The district valuer entered into negotiations for the purchase of the land by agreement with the owner, but on Apr. 28, 1950, she agreed to sell

it for £1,750 to a third party. On July 14, 1950, the Central Land Board made a compulsory purchase order in respect of the land, and, on Dec. 20, 1950, that order was confirmed by the Minister of Town and Country Planning.

HELD: the compulsory purchase order and the confirming order were valid because:

(i) the manufacturers were competent to make their application for planning permission since not only the owner and a prospective purchaser with his consent, but also any person who genuinely hoped to acquire an interest in the land, could apply for planning permission in respect of it.

Observations of VAISEY, J., in *Ayles v. Romsey & Stockbridge Rural District Council* (1944) (108 J.P. 176), considered.

(ii) the planning permission was valid although the local planning authority had not notified the owner or likely objectors that they were considering the application for it, because the Town and Country Planning Act did not require such notification.

(iii) the orders would not be invalidated even if the planning permission were invalid, since they constituted only the authority to acquire the land and not its acquisition and s. 43 (1) of the Act of 1947 only required that planning permission should be obtained before actual acquisition.

Travis v. Minister of Local Government & Planning (1951) (115 J.P. 500), followed.

(iv) they were not invalidated by the existence of a prospective purchaser willing to buy the land at a price acceptable to the owner, because the Central Land Board were exercising their powers of compulsory purchase to prevent a sale at a price in excess of existing use value.

Earl Fitzwilliam's Wentworth Estates Co. v. Minister of Town and Country Planning (1951) (115 J.P. 309), applied.

MOTION to quash a compulsory purchase order and a confirmation order made under the Town and Country Planning Act, 1947, s. 43 (1) and (2).

A piece of land owned by the applicant was the subject of a compulsory purchase order made by the Central Land Board under s. 43 (1) and (2) of the Town and Country Planning Act, 1947, on July 14, 1950, and confirmed by the Minister of Town and Country Planning (later the Minister of Local Government and Planning) on Dec. 20, 1950. The applicant contended that the two orders were invalid on the following grounds: (i) when they were made there was no valid planning permission for the development of the land under Part III of the Act of 1947, because (a) the persons who had applied for permission were not the owners of the land and had not an interest in it sufficient to support the application, and (b) when purporting to grant the permission the local planning authority had not exercised their functions under the Act of 1947 in a judicial manner since they had not notified the owner of the land that they were considering the application; (ii) as there was, in addition to the prospective purchasers on whose behalf the Central Land Board had made their compulsory purchase order, another prospective purchaser whose offer to buy the land the owner had accepted, the two orders were made, not to bring the land into development, but to prefer one approved development of the land to another. The respondents, the Minister and the Central Land Board, submitted that the planning permission was valid, but that in any event the orders constituted only the authority to acquire the land and not its acquisition within the meaning of s. 43 (1) of the Act of 1947, and, therefore, that that sub-section did not require them to obtain planning permission before the making of the orders. They contended also that the orders were made in pursuance of the board's powers of acquiring land to prevent a sale at a price in excess of existing use value and so were valid notwithstanding the existence of a prospective purchaser willing to buy at a price acceptable to the owner.

Sir Arthur Comyns Carr, Q.C., and *Kekwick* for the applicant.

The Attorney-General (Sir Lionel Heald, Q.C.) and *J. P. Ashworth* for the respondents.

PARKER, J.: This is a motion pursuant to para. 15 of sched. I to the Acquisition of Land (Authorisation Procedure) Act, 1946, on behalf of the applicant to quash a compulsory purchase order known as the Central Land Board (Southend Lane, Sydenham), Compulsory Purchase Order, 1950, and a confirmation order entitled the Central Land Board (Southend Lane, Sydenham) Compulsory Purchase Confirmation Order, 1950, on the ground that the making of those orders was not within the powers of the provision pursuant to which they purported to be made, viz., s. 43 (1) and (2) of the Town and Country Planning Act, 1947, empowering the Central Land Board to acquire land in certain circumstances. Section 43 provides:

"(1) The Central Land Board may, with the approval of the Minister, by agreement acquire land for any purpose connected with the performance of their functions under the following provisions of this Act, and in particular may so acquire any land for the purpose of disposing of it for development for which permission has been granted under Part III of this Act on terms inclusive of any development charge payable under those provisions in respect of that development. (2) If the Minister is satisfied that it is expedient in the public interest that the board should acquire any land for any such purpose as aforesaid, and that the board are unable to acquire the land by agreement on reasonable terms, he may authorise the board to acquire the land compulsorily in accordance with the provisions of this section."

The applicant was at all material times the owner of certain land at Southend Lane, Sydenham, in the metropolitan borough of Lewisham, on which there were eight cottages either condemned or partly demolished. In January, 1950, she was offering the land for sale for between £2,300 and £2,100, and was approached by a firm of sheet metal workers, Messrs. Blanshard Bros., who desired to acquire the site for the erection of a small factory. Unknown to the applicant, on Oct. 7, 1949, Blanshard Bros. had applied to the London County Council for planning permission for the erection of this factory, and on Dec. 16, 1949, they received what appears to be planning permission for its erection on the land. Blanshard Bros., however, having had the land valued on an existing use basis refused to pay more than £400 or £450. The applicant by her advisers was adamant that the least she would accept was £2,100, and towards the end of January and the beginning of February Blanshard Bros. in effect requested the Central Land Board to exercise their powers under s. 43 of the Act. As a result in April, 1950, the district valuer got in touch with the applicant with a view to purchasing the land by agreement. On Apr. 18 the applicant refused to sell at any price lower than that which she was asking. On Apr. 28 the applicant received an offer of £1,750 from a Mr. Terry, a builder or a joiner, who desired to acquire the site for the erection of a joinery workshop. This sum was finally accepted by the applicant and a draft contract was prepared by her solicitors and forwarded to Mr. Terry's solicitors for agreement. It was in those circumstances that, on July 14, 1950, the Central Land Board made the compulsory purchase order in question. There followed objections by the applicant. On Oct. 17 an inquiry at which the Minister of Town and Country Planning appointed somebody to hear the applicant's objections (an alternative procedure to a public inquiry) took place, the applicant appearing by counsel and voicing her objections. On Dec. 20 the Minister confirmed the compulsory purchase order.

Of the four grounds on which this motion is founded the fourth was by way of amendment no doubt as a result of the decision of the House of Lords on s. 43

(1) and (2) of the Act of 1947 in *Earl Fitzwilliam's Wentworth Estates Co. v. Minister of Housing & Local Government* (1). The first two grounds were abandoned, and the case has been argued on grounds (iii) and (iv) which were as follows:

" (iii) That the said orders were made, not for the purpose of the functions of the Central Land Board or for the purpose of bringing into development the land to which the said orders relate, but for the purpose of preferring one approved development of the said land to another. (iv) Alternatively that at the time of the making of the said orders and each of them there was no planning permission under Part III of the said Act for the development for the purpose of which the land was to be disposed."

On the last point it is said that the document of Dec. 16, 1949, purporting to give Blanshard Bros. permission to erect a factory is invalid and a nullity in that, if I accept the applicant's evidence on affidavit—which I do—the application was not made by her or with her consent, she being in October, November and December, 1949, owner of the land. Section 12 and the other sections in Part III of the Act of 1947 are silent as to who should be the applicant for permission to develop land and whether it can only be the owner or somebody who either has or is about to have some interest in the land. *Ayles v. Romsey & Stockbridge Rural District Council* (2) decided by VAISEY, J., on Mar. 16, 1944, concerned s. 10 of the Town and Country Planning Act, 1932, which is replaced, if not verbatim, in very much the same wording by s. 12 of the Act of 1947. The case is, I think, authority for this, that it is not anybody who can validly make an application for permission. The applicant in that case for permission—the plaintiff in the action—was a builder who, if his clients bought the land and obtained permission, would carry out the development for them. He deposited plans and applied for permission which was refused, and he then brought an action for a declaration that he had been or should have been granted permission. VAISEY, J., said (108 J.P. 176):

" I am not prepared to hold that the applicant within the meaning of s. 10 (3) of the Town and Country Planning Act, 1932, need necessarily have a present interest in the land. I am disposed to think that he must be a person who has either a present or a prospective interest in the land, and I find great difficulty in supposing that he can be a person whose interest may only be that, if leave to build on the land is obtained, he may be concerned in it as a contractor . . . I should have thought that the real applicant in this case was not the plaintiff, who was the builder who prepared the plans, or the draughtsman who drew them, or the person who took them round to the offices of the council, but either the then present owners of the land . . . or, alternatively, the three persons whose names appear on the plans and who intended, if consent should be given, to develop the land by employing the plaintiff as their builder to construct bungalows on it."

Counsel for the applicant goes further and says that the only person who can make such an application is the owner of the land or a prospective purchaser who has the owner's consent. It is clear in the present case that the applicant knew nothing at all about the application for planning permission.

There is, however, in my view, nothing in Part III of the Act providing expressly or even impliedly that the applicant must be the owner or somebody applying with the owner's consent. If one looks at the matter before this difficult section—s. 43—became part of the law, it was clearly to any owner's advantage

(1) ante p. 183; [1952] 1 All E.R. 509.

(2) (1944), 108 J.P. 175.

that planning permission in respect of his land should be given and it mattered not to him who obtained that permission. Once permission was obtained it would enhance the value of his land and he would be the last person to complain. It seems to me that under Part III of this Act anybody who genuinely hopes to acquire the interest in the land can properly apply for planning permission. It is said that the implication generally in ss. 18 to 23 of the Act of 1947 is that the person applying should be the owner or somebody with the owner's consent. I get very little help from those sections. It seems to me that more help is to be derived from the fact that the only person who is contemplated as an aggrieved person able to appeal to the Minister under s. 16 is a person who has himself applied for planning permission.

In the alternative it is said that, even if the application need not be made by the owner or with his consent, at least the planning authority must notify the owner and give him an opportunity to raise objections and generally to be heard. But there are no provisions in the statute or in the Town and Country Planning (General Development) Order, 1948 (S.I. 1948, No. 958) (now superseded by the Town and Country Planning General Development Order and Development Charge Applications Regulations, 1950 (S.I. 1950, No. 728), art. 12, relating to town planning for such matters as advertisement or notification of any particular person or of the owner. The only provision with regard to informing people of applications and permissions is, apparently, to be found in art. 12 of the order of 1948. That article provided for a register to be kept in which particulars were to be entered of any applications for permission and of any decisions resulting. That register is required to be kept in a particular form and at a convenient place, and by s. 14 (5) of the Act of 1947 is to be available for inspection of the public at all reasonable hours. It is, however, said that, although there is no statutory provision relating to this matter, the proceedings before the town planning authority are in the nature of judicial proceedings and on general principle in such proceedings the tribunal must give any person likely to be affected or interested an opportunity of appearing before it and being heard. Reference was made to *Rex v. Hendon Rural District Council, Ex p. Chorley* (1), but it is to be observed that in that case the rural district council, though not, apparently, bound to do so, did, in fact, give notice of the application. Further, proceedings before a town planning authority may well be in the nature of judicial proceedings so that certiorari will lie, but, in my view, it does not follow that any particular procedure such as is adopted in courts of law must necessarily be adopted in those proceedings. It seems to me that one must look at the legislation which is in question and see whether under that legislation it is required that persons or any particular person should be notified and be heard. Under the scheme of this legislation I can see no ground for saying that any particular notice should be given to an owner or that the owner should be given an opportunity of being heard.

In my opinion, this planning permission was perfectly valid, but it has been argued that, if I am wrong in that and if the planning permission is invalid, it does not follow that the orders in question were ultra vires. It is said that it is sufficient if planning permission has been obtained at any moment prior to the actual acquisition of the land and that these orders do not amount to an acquisition of the land, but merely give authority for its acquisition. On behalf of the Crown reliance is placed on the decision of DEVLIN, J., in *Travis v. Minister of Local Government & Planning* (2), where he held that, assuming that the words in s. 43

(1) (1933), 97 J.P. 210; [1933] 2 K.B. 696.

(2) 115 J.P. 500; [1951] 2 All E.R. 673; [1951] K.B. 956.

(1) of the Act of 1947 empowering the board to "acquire any land for the purpose of disposing of it for development for which permission has been granted" referred to the time of acquisition and not to the purpose for which the board could acquire land, land was "acquired" within the meaning of the sub-section neither when the compulsory purchase order was made by the board nor when the confirmation order was made by the Minister, but only when it was actually acquired, in the ordinary sense of the word "acquire," after notice to treat, and, therefore, the applicant had failed to show that the compulsory purchase order was premature because planning permission had not been given before it was made. That decision was given between the hearing of *Fitzwilliam's* case (1) in the Court of Appeal and its decision in the House of Lords and it is argued on behalf of the applicant that DEVLIN, J.'s decision is inconsistent with the speeches in the House of Lords in that case. It is further said with considerable force that, although a meticulous reading of s. 43 (1) and (2) of the Act of 1947 might support DEVLIN, J.'s decision, no court should be astute to read those words meticulously having regard to the possible results which would follow, because, if DEVLIN, J.'s decision is right, there might be negotiations for a purchase by agreement, there might be a compulsory purchase order, there might be a public inquiry, there might be a confirmation by the Minister, there might be a notice to treat and an arbitration, and, if at the end of that and immediately before the acquisition was going to be completed the planning authorities were to be approached for the first time and refused permission, the whole of the previous proceedings would have been a farce. It seems to me that there is nothing in the speeches in *Fitzwilliam's* case (1) which throws any light on DEVLIN, J.'s decision. The point was not present, as it seems to me, in any of their lordships' minds, and I think it would be wrong to take isolated words from speeches and seek to argue that they differ in some way from the decision arrived at by DEVLIN, J. That being so, I consider myself bound by DEVLIN, J.'s decision, with which I entirely agree. While appreciating the argument that, if it is right, in certain circumstances an absurd position might be created, it seems to me that the real safeguard is to be found in the powers to be exercised by the Minister. No land can be acquired by agreement without the Minister's approval and no land can be compulsorily acquired without the order being confirmed by the Minister, and, no doubt, as a matter of administration he would take good care that his approval was not given, or a confirmation order made, unless planning permission had been obtained or was on the point of being obtained.

The second point taken on behalf of the applicant was that the Central Land Board were here preferring one person to another. In effect it is said that a close scrutiny of the speeches in *Fitzwilliam's* case (1) in the House of Lords shows that the power given by s. 43 (1) and (2) of the Act of 1947 can only be used if development is threatened to be held up. It was urged that this power can only be exercised if, a single developer alone being available, he refuses to pay the price asked and the development charge and will not buy unless he can buy at the existing use value, but that, if there are one or more developers who are willing to pay the price asked, albeit above the existing use value, and in addition to pay the development charge, the powers given by the section cannot be exercised. It seems to me that that cannot be said to follow from the speeches in the House of Lords. The Court of Appeal had clearly said that the board might exercise their powers to prevent sales at more than the existing use value. If one pauses there, it is clear in this case that when, on Apr. 28, Mr. Terry offered

(1) ante p. 183; [1952] 1 All E.R. 509.

to pay £1,750, which was in excess of the existing use value, and that offer was accepted, there was a real threat that, if the board did not exercise their powers, the land would be sold at more than the existing use value. As it seems to me, there is nothing in the speeches in the House of Lords which would lead one to suppose that they disapproved of the Court of Appeal's interpretation of the board's powers. For my part I get most assistance from the speech of LORD TUCKER, who says (ante p. 194):

"I think that unrestricted sales on a large scale at prices in excess of existing use value would render more difficult the proper ascertainment of the true existing use value which is a necessary element in calculating the development charge, and that, it being the function of the board to collect the charge to set it against the payments which they will have to make out of the £300,000,000 compensation fund, a policy which tends to facilitate and ensure a speedy payment of the charge by including it in the sale price is a policy the implementing of which is connected with their fiscal functions under the Act."

It seems to me that, if the argument on behalf of the applicant is right and the board cannot exercise their powers if there is a developer willing to pay, in effect, the development value plus the development charge, the functions of the board would become almost impossible because an existing use value, presumably, must bear some relation to existing facts, and, if a series of sales in excess of the current existing use value were permitted, a time would come when the existing use value would become equivalent to the development value. It must be part of the board's functions to prevent sales for more than existing use value, and it seems to me that in the circumstances of this case there was a real reason to believe that the applicant, left to herself, would sell this land at more than its existing use value. Therefore, I see nothing ultra vires in the order made by the board or the order of confirmation by the Minister, and this motion must be refused.

Application refused.

Solicitors: *Stow & Co.* (for the applicant); *Treasury Solicitor* (for the respondents).

F.A.A.

CHANCERY DIVISION

(LLOYD-JACOB, J.)

Apr. 24, 28, 29, 1952

UTTOXETER URBAN DISTRICT COUNCIL v. CLARKE AND OTHERS

Housing—Compulsory purchase order—Acquisition of house with land—Duty of acquiring authority to convert house for working-class dwellings—Power of High Court to review order—Housing Act, 1936 (26 Geo. 5 and 1 Edw. 8, c. 51), s. 79 (4)—Acquisition of Land (Authorisation Procedure) Act, 1946 (9 and 10 Geo. 6, c. 49), sched. 1, para. 16.

An urban district council acquired a house and about seven acres of land by virtue of a compulsory purchase order made under Part V of the Housing Act, 1936, which was confirmed after an inquiry by the Minister. The owner did not appeal to the High Court against the order under sched. 1, para. 15, to the Acquisition of Land (Authorisation Procedure) Act, 1946. He refused to give up possession, was evicted under a warrant issued by the sheriff, and re-entered the land a week later. In an action by the local authority for an injunction restraining the former owner from trespassing on the property it was submitted by the owner (i) that the compulsory purchase order was bad on its face because the acquired property was not used for housing purposes; (ii) that the house was not immediately converted into suitable dwellings for the ratepayers, which was a breach of the council's obligation under the Housing Act, 1936, s. 79 (4); (iii) that even if the council had a good possessory title, the court, in exercise of its equitable jurisdiction, would refuse to assist the council in the circumstances from evicting the former owner from the property which was unlawfully taken from him. It was submitted for the council that (i) by reason of sched. 1, para. 16, to the Act of 1946, the court could not go behind the compulsory purchase order, (ii) that the proposed use of the premises was known to the Minister in confirming the order, and (iii) that the council, having satisfied all the statutory requirements, were entitled to possession and the injunction claimed.

HELD: (i) having regard to the provisions of sched. 1, para. 16, to the Acquisition of Land (Authorisation Procedure) Act, 1946, it was not open in these proceedings for the court to go behind the order as it was made and confirmed.

(ii) no obligation was imposed on an acquiring authority by s. 79 (4) of the Housing Act, 1936, to convert any building which was compulsorily acquired, because that sub-section related only to buildings acquired for conversion under s. 73 (b) of that Act.

(iii) the fact that land was acquired on the face of a compulsory purchase order for housing purposes and was not so used did not invalidate the order, and the local authority was entitled to use the land for the related purposes described in Part V of the Act of 1936.

(iv) in the circumstances it was the duty of the court to secure by appropriate means that the possessory title of the council should be safeguarded.

ACTION.

The Uttoxeter Urban District Council claimed an injunction restraining the defendants from remaining on or re-entering certain premises, namely, Heath House estate, consisting of Heath House together with some seven and a half acres of land and a dwelling-house and curtilage, known as No. 90, Cheadle Road, which the council had acquired by virtue of a compulsory purchase order made under Part V of the Housing Act, 1936, and confirmed by the Minister of Health. Only the first defendant, William Clarke, appeared. In 1935 the first defendant who then lived at No. 90, Cheadle Road, urged the council to purchase for housing purposes Heath House estate, which was being offered for sale. The council not being minded to buy the estate, the first defendant himself acquired it and endeavoured to obtain planning permission to develop it as a private housing estate. Heath House estate was almost surrounded by housing property owned by the council. After the first defendant had acquired the property, he

several times gave the council an opportunity of purchasing the property from him. Later he converted Heath House into a private hotel, went to live there, and managed it with his family. In 1945 the council decided to acquire the property, and, as the negotiations with the first defendant failed, the council gave notice of its intention to acquire the estate compulsorily. In October, 1946, a compulsory purchase order was made, and, after a local inquiry at which the first defendant appeared, the Minister confirmed the order. The first defendant did not apply to the High Court under para. 15 of sched. I, to the Acquisition of Land (Authorisation Procedure) Act, 1946, and he took no part in the proceedings for the assessment of the value of the estate which was assessed at £8,000 which amount represented, according to the first defendant, only a fraction of its value. In April, 1947, notice to treat, and in May, 1950, notice of entry were given. The first defendant refused to quit the estate, and in July, 1950, he was evicted under a warrant issued by the sheriff under the Lands Clauses Consolidation Act, 1845, s. 91. Shortly afterwards the first defendant re-entered the land. On Aug. 8, 1950, DONOVAN, J., granted an interlocutory injunction which the first defendant obeyed. The council had not used the land for housing purposes, and Heath House was not converted to provide housing accommodation but was used for purposes of the Staffordshire County Council and to provide dental facilities. No. 90, Cheadle Road remained in the occupation of the tenant to whom the first defendant had let the property.

W. L. Roots for the plaintiffs, Uttoxeter Urban District Council.

The first defendant, William Clarke, appeared in person.

The other defendants, a daughter and son-in-law of the first defendant, did not appear and were not represented.

LLOYD-JACOB, J.: The plaintiffs seek to protect a possessory title which they claim in a property known as Heath House, together with some seven and a half acres of land in which it stands, a dwelling-house, No. 90, Cheadle Road, in its immediate vicinity, and certain other buildings and appurtenances thereunto belonging, which possessory title they claim is properly founded on the Uttoxeter Urban District (Heath House Estate) Compulsory Purchase Order, 1946, made under the Housing Act, 1936, and the Acquisition of Land (Authorisation Procedure) Act, 1946, which was confirmed by the Minister. [His LORDSHIP stated the facts and continued:] The compulsory purchase order purports to be an exercise by the council of rights arising under the Housing Act, 1936, Part V, in respect of the land and properties which are identified in the map attached to the order. The main burden of the first defendant's complaint is that the order is one which this court should not permit to be enforced because the purpose for which it was sought was not in fact intended to be attained by the purchase and has not been attained having regard to the way in which the council have made use of the property since they acquired possession of it. That view proceeds on a misapprehension of the Housing Act, 1936, and, therefore, it is desirable that I should make reference to the powers and duties which are cast on local authorities by Part V of that Act. It is to be noted that by s. 71 the local authority is charged with the duty of surveying the housing conditions in the district with a view to preparing and submitting to the Minister proposals for securing the satisfactory housing of persons within the area. By s. 73 the local authority is granted power (a) to acquire land, including any houses or buildings thereon, as a site for the erection of houses, and (b) to acquire houses or other buildings which are or, by conversion may be made, suitable for housing purposes and for other purposes set out in the section. By s. 79 it is provided that local authorities who have acquired any

land for the purposes of this Part of the Act may do certain acts in connection with property so acquired. It is interesting to note that those specific provisions are expressed to be without prejudice to any powers that the local authority may have under the remainder of the Act. By s. 79 (4) it is provided that where a local authority acquire a house or other building which can be made suitable by conversion for housing purposes it shall forthwith proceed to secure by alteration, enlargement, repair, improvement or adaptation that it is so fitted.

The first defendant's submission is, as I understand it, that because Heath House itself is a building on the land compulsorily acquired there is an obligation resting on the council under s. 79 (4) forthwith to secure, by alteration, enlargement, repair, improvement or adaptation, that it should be converted into suitable dwellings. That submission, in my judgment, is erroneous. As I read the section, it is directed to the instance where the local authority acquires a house for conversion, and it is by no means obligatory in respect of houses which are acquired as part of an estate. Accordingly, I do not think it right to infer that the failure of the council to convert Heath House into suitable dwellings is in itself an indication that the avowed purpose of their acquisition, viz., that it was to be for the purposes of Part V of the Housing Act, 1936, was erroneous.

In the course of his submissions the first defendant developed an argument based on the undoubted right of a citizen of this country to be permitted to retain his own property except when deprived of it by due process of law. That is a principle which I trust this court will always use its best endeavours to secure, and there is nothing contrary to any of the foundations of our great right in the present proceedings unless it appears that the acquisition of this property compulsorily is not in accordance with the law of this country. It is, perhaps, desirable, seeing that the first defendant appeared in person, that I should indicate the proper approach to a matter of that sort. It is the fact that, with the appreciation of the importance of safeguarding the public interest, as time has gone on it has become necessary for private rights to be made subservient to the public interest, and the statute book contains a number of instances where private rights are open to question and in some cases to acquisition where they conflict with an overriding public interest. This compulsory purchase order is an instance of that general attitude. Whereas here the requirements for the housing of the persons in this urban district in truth justifies the acquisition of property so as to provide that housing, then persons who are fortunate enough to own property suitable for that purpose may find themselves in a position to discharge their public duty and at the same time to receive compensation for their property by following the procedure laid down for the acquisition of housing estates.

Counsel for the council made a submission based on the Acquisition of Land (Authorisation Procedure) Act, 1946, under which the Minister operated in the present case. By para. 15 of sched. I to that Act, provision is made for the steps to be taken by any person who regards himself aggrieved by a compulsory purchase order. It is provided that, if any person desires to question the validity of a compulsory purchase order or of any provision in it, he must make an application to the High Court, and it is provided that that must be within six weeks from the date on which either the making of the order or the notice of confirmation is first published, and in the present case there is no question that that period of time has long since expired. The Act further provides, in para. 16, that

"Subject to the provisions of the last foregoing paragraph, a compulsory

purchase order . . . shall not, either before or after it has been confirmed, . . . be questioned in any legal proceedings whatsoever, and shall become operative on the date on which notice is first published as mentioned in the last foregoing paragraph."

In its wisdom, Parliament appears to have decided that the provision of a limited period within which the action of the authority and Minister can be questioned before the courts is a suitable procedure in cases such as the present, and if Her Majesty's lieges do not adopt the procedure laid down by Parliament they cannot seriously suggest that they are suffering any injustice if, having laid by and let the time run out, they then seek to develop an argument against the propriety of the order. I hold that, having regard to the terms of the Acquisition of Land (Authorisation Procedure) Act, 1946, it is not open in the present proceedings for this court to go behind the order as it was made and confirmed, but again, although I hold that view, it is desirable in a case where the defendant is appearing in person that I should indicate the opinion I have formed as a result of listening to the evidence and his submissions on it. Had it been open to me to go behind the form of this order and to investigate the propriety of the representations it contains as to the purpose for which this property was sought to be acquired, I should myself have no difficulty in coming to the conclusion that it was a perfectly genuine order. It appears that since they came into possession of the property, the council have not built houses on the land, nor have they converted the main house, and, indeed, the only conversion they appear to have made is to remove the possibility of living accommodation in certain of the outbuildings by constructing garages for ambulances and the like. It is submitted that that is abundant evidence that the suggestion that the property was acquired for the purposes of the Housing Act, 1936, is completely misconceived. I have already expressed my view as to the fallacy in the argument under the Housing Act, 1936, that the acquisition of an estate on which there is a house or other buildings necessarily requires the local authority to convert that house or building immediately into dwellings. Apart altogether from the fact that changing circumstances, acquisition of other properties in the neighbourhood, and the like, may well have caused alteration in the immediate needs of the local authority, I am satisfied that, had it been necessary, the council could have proved that their avowed purpose in the purchase of this property had been made out.

Injunction granted.

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *F. S. Hawthorn & Son, Uttoxeter* (for the council).

F.G.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., OLIVER AND BYRNE, JJ.)

Apr. 25, 1952

SNODGRASS v. TOPPING

Food and Drugs—Selling milk to prejudice of purchaser—Prosecution by chief sanitary inspector—Authority to prosecute—Food and Drugs Act, 1938 (1 and 2 Geo. 6, c. 56), s. 3.

The respondent was charged before magistrates with selling to the prejudice of the purchaser milk which was not of the substance demanded by the purchaser, contrary to s. 3 of the Food and Drugs Act, 1938. The information was laid by the chief sanitary inspector of the borough, who was the purchaser. In December, 1944, the borough council had authorised the chief sanitary inspector for the time being to lay informations in respect of prosecutions. The justices, being of opinion that the resolution of the council was limited or controlled by a standing order, which was referred to in the course of the hearing but never proved, dismissed the information on the ground that the chief inspector had no authority to prosecute.

HELD: that the decision of the justices was wrong, as the statute contained no limitation on the common law right of any person, whether a person aggrieved or not, to take proceedings in respect of an offence; in any event, the prosecutor in the present case was the purchaser; and any purchaser of an article of food found to be to his prejudice was entitled to take proceedings.

CASE STATED by Bury justices.

At a court of summary jurisdiction at Bury an information was preferred by the appellant, Arthur Edgar Snodgrass, chief sanitary inspector of the borough, charging the respondent, William Topping, with selling to the prejudice of the purchaser certain food, namely, milk, which was not of the substance demanded by the purchaser in that the said food was then deficient in fat, contrary to s. 3 of the Food and Drugs Act, 1938. The information was laid by the chief sanitary inspector, who was the purchaser of the milk. The justices dismissed the information on the ground that the chief inspector had no authority to prosecute. They found that on Dec. 7, 1944, the borough council authorised the chief sanitary inspector for the time being to lay informations in respect of prosecutions, but that the resolution was limited or controlled by a standing order, which was referred to by counsel, but never proved. The chief sanitary inspector appealed.

Backhouse for the appellant.

Abdela for the respondent.

LORD GODDARD, C.J.: Certain points were taken before these justices which it is regrettable should have been taken, because advocates should not take before lay tribunals points which they know perfectly well they would never dare to take before the High Court. It is said here that the justices have dismissed this case on the ground that the chief sanitary inspector, who was found to have been the purchaser, had no authority to prosecute. In the first place, he does not want any specific authority to prosecute. The Act does not contain any limitation whatever on the common law right of any person to take proceedings if an offence has been committed, whether he is a person who is aggrieved or not. It would be unusual, of course, for proceedings to be taken by a person who is not a person aggrieved. In this case the chief sanitary inspector laid the information, because he was the purchaser of the milk that was found to be deficient in fat, and, therefore, the sale was to his prejudice, and why he should not prosecute in those circumstances I cannot understand.

That is enough to dispose of the case, but as the justices dealt with some other points I will very briefly deal with them. They find that on Dec. 7, 1944, the council authorised the chief sanitary inspector for the time being to lay informations in respect of prosecutions. They then refer to a standing order, which was referred to by counsel but never proved before them, as limiting or controlling in some way the earlier resolution. They had no right to consider the standing order because it was never proved before them. The resolution was a resolution under s. 277 of the Local Government Act, 1933, which provides:

"A local authority may by resolution authorise any member or officer of the authority, either generally or in respect of any particular matter, to institute or defend on their behalf proceedings before any court of summary jurisdiction . . ."

That section gives local authorities the widest possible powers to authorise, and the local authority in the present case exercised those powers. I have no doubt that, in practice, if the chief sanitary inspector was minded to take proceedings in respect of matters which had nothing to do with the Public Health Department, he would be told by his authority not to interfere with those matters, but the present appellant had statutory authority to start prosecutions on behalf of the council. We need not, however, consider that because the appellant has taken proceedings in this case because he was the purchaser of the milk, and any purchaser of milk or food or drugs which is found to be to the prejudice of the purchaser can take proceedings. This case must go back to the justices with an intimation that they did not come to a correct decision in point of law, and, as the offence was proved, with a direction to convict.

OLIVER, J.: I agree.

BYRNE, J.: I agree.

Solicitors: *Lewin, Gregory, Torr, Durnford & Co.*, for *Edward S. Smith*, town clerk, Bury (for the appellant); *Kingsford, Dorman & Co.*, for *Shasha and Hamwee*, Manchester (for the respondent).

T.R.F.B.

COURT OF APPEAL

(SOMERVELL, JENKINS AND MORRIS, L.JJ.)

April 29, 1952

STACK v. CHURCH COMMISSIONERS FOR ENGLAND .

Housing—Conversion of house into several tenements—"Conversion"—Structural alteration—Single-room "flatlets"—Effect on character of neighbourhood—Discretion of county court—Housing Act, 1936 (26 Geo. 5 and 1 Edw. 8, c. 51), s. 163.

The applicant, assignee of a house, belonging to the respondents, found that he could not sub-let it as a single tenement, but could readily do so if it were converted into one-room tenements, and he applied to the county court under s. 163 of the Housing Act, 1936, to vary the terms of the lease which prohibited the conversion. The respondents contended that the applicant's proposed conversion into single-room "flatlets" instead of self-contained flats of two or more rooms would tend to lower the general character of the neighbourhood. They submitted that "conversion" meant structural alteration and that the court had no jurisdiction under s. 163 to vary the terms of the lease. The county court judge made an order granting relief to the applicant.

HELD: "conversion" in s. 163 did not import the necessity of structural alteration; the question whether a proposed conversion would tend to lower the character of the neighbourhood was one for the county court judge; and, he being satisfied on this question of fact, his order was right.

APPEAL by the respondents, the ground landlords, against an order made by His Honour JUDGE PUGH at Bloomsbury County Court on Feb. 1, 1952, varying the terms of the lease of a house granted by them to the applicant whereby he was prohibited from converting the house into separate tenements.

Heathcote-Williams, Q.C., and Denny for the respondents: The object of s. 163 of the Housing Act, 1936, was to enable a permanent physical conversion of property subject to a restrictive covenant to be made. The creation of tenements must not be confused with the conversion of a property into several dwelling-houses. The words of the section "if converted" could have been omitted if it had not been the intention of the Act that there should be an actual physical conversion. The language of the section was not apt to permit of a conversion merely by a different mode of letting, otherwise the tenant would be at liberty to create as many separate tenancies as he liked. The county court judge should have limited a number of tenancies into which the house could be converted, and the fact that he had not done so was to allow an alteration of the character of the property which was not in accord with the provisions of the Act of 1936.

Granville Sharp, Q.C., and Seuffert for the applicant.

SOMERVELL, L.J.: This is an appeal from an order made by His Honour JUDGE PUGH on an application made under s. 163 of the Housing Act, 1936, which reads:

"Where it is proved to the satisfaction of the county court on an application by the local authority or any person interested in a house that, owing to changes in the character of the neighbourhood in which the house is situate, the house cannot readily be let as a single tenement but could readily be let for occupation if converted into two or more tenements, and that, by reason of the provisions of the lease of or any restrictive covenant affecting the house, or otherwise, such conversion is prohibited or restricted, the court, after giving any person interested an opportunity of being heard, may vary

the terms of the lease or other instrument imposing the prohibition or restriction so as to enable the house to be so converted subject to such conditions and upon such terms as the court may think just."

The house with which the application is concerned, 2 Belsize Park Gardens, Hampstead, is one of a number of houses in that neighbourhood owned by the respondents to the application, the Church Commissioners for England. In 1927 it was the subject-matter of a lease for 999 years granted by the respondents to the Royal London Society for Teaching and Training the Blind. There were various repairing and restrictive covenants into the details of which I will not go because the whole of the proceedings before us were on the basis that what the applicant required to do was prohibited by the lease, and, therefore, he would have been in breach unless he obtained relief from the conditions of the lease with regard to the matter in question. He was the assignee of the lease and it is not disputed that he was a person interested in the house within the meaning of the section. Having obtained a leasehold interest, he made this application on the ground that, owing to changes in the character of the neighbourhood in which the house was situate, it could not readily be let as a single tenement but it could readily be let for occupation if converted into two or more tenements, and by reason of the provisions of the lease such conversion was prohibited. When the matter came before the judge it was conceded by counsel for the respondents that there had been a change in the character of the neighbourhood so that the house could not readily be let as a single tenement but could readily be let for occupation if converted into two or more tenements, and there was evidence given as to the user of other houses in the neighbourhood.

The contest between the parties is this. The applicant wanted to sub-let the house as single-room "flatlets", as they were called in the evidence. He said that cooking facilities of some kind would be installed and also a wash basin and a sink. The idea was that these "flatlets" would be suitable as single rooms in which a person could live and cook food. As to the normal sanitary arrangements, water closets and bathrooms would be used by the occupants of these flatlets in common. The respondents' point was that they wanted the houses in this neighbourhood converted only into self-contained flats, that is to say, flats which had their own bathroom and sanitary arrangements, and, no doubt, usually more than one room—two or three-roomed flats. Most of the houses nearby have been so converted, and it was the respondents' policy when they granted new leases to insist on such conversion if a house was not suitable to be let as a single tenement, and they submitted that that would be in accordance with the character of the neighbourhood whereas letting single rooms would tend to lower the general character of the neighbourhood. In giving judgment the learned judge said:

"Once it had been conceded by the respondents that this house could only be let if converted into two or more tenements, I could see no possible objection to the principle of what one of the respondents' witnesses called 'fragmentation' being applied to it, especially in view of the notorious difficulties that lie in the way of young people seeking living accommodation today."

A point taken before the judge is, I think, the only point available before us. Counsel for the respondents took as a point of law that "converted" in this section must mean a structural alteration. The judge said he did not agree. He held that

"to turn a house into one in which each room has its own cooking and

washing arrangements is a conversion. I do not think this section requires a structural alteration."

Counsel for the respondents emphasised that what s. 163 is dealing with is the conversion of a house, and that it would be wrong to treat those words as covering a purely functional division—i.e., without any structural alteration letting rooms separately as they are. No doubt, the section was intended to cover cases where structural alteration was necessary, and that as a rule would make a more serious inroad on the covenants in the lease than a mere breach of a covenant with regard to letting because the breach of a covenant with regard to letting is not incurable, whereas, if there is a structural alteration and what was a single twelve-roomed house is turned into four or more self-contained flats, what the landlord will get at the end of the lease is something different from what he demised. So, words had to be used to cover that case, and I should have thought that, *prima facie*, the greater included the less. Parliament was prepared to give power to the county court to sanction the greater inroad, and unless there were express words I should have thought that covered the lesser inroad.

I do not find any difficulty in construing the word "converted", which is a wide word, to cover the type of change which is contemplated here. It did, indeed, involve some structural alteration. It is very difficult to conceive of a case in which the letting of a single room for occupation by people would not involve some structural alteration, but, even if, owing to a multiplicity of bath-rooms and sanitary arrangements, a house could be let off as two or more tenements, self-contained flats, without any structural alteration, I cannot see why the county court should not have jurisdiction to deal with an application of that kind under the words used in the section. When I put to counsel for the respondents what was the policy, as it were, which sanctioned the greater, but excluded the less, he submitted that one ought to find in this section a desire to maintain housing standards. In a sense, however, the section contemplates the lowering of housing standards in that it provides for families being housed in fewer rooms than they were housed in when the whole house was let as a single tenement. The section leaves it to the court to decide what shall be sanctioned. I think such questions as to standard, whether for instance a house is to be turned into five or six-roomed flats, or two-roomed flats with their own sanitary arrangements, or one-roomed flats fitted with washing equipment, are questions which under this section Parliament has left to be determined by the county court judge. I, therefore, come to the conclusion that in this case the judge had jurisdiction to make the order which he made, and, having read his judgment, I cannot see any other possible ground on which we should interfere with the conclusion to which he came. I think this appeal should be dismissed.

JENKINS, L.J.: I agree.

MORRIS, L.J.: I agree.

Appeal dismissed

Solicitors: *J. H. MacDonnell* (for the applicant); *Milles, Day & Co.* (for the respondents).
G.F.L.B.

PROBATE, DIVORCE AND ADMIRALTY DIVISION

(LORD MERRIMAN, P., AND PEARCE, J.)

April 30, 1952

CHIPPERFIELD v. CHIPPERFIELD

Justices—Custody of child—Revocation of order in wife's favour—No misconduct by wife—Welfare of child paramount consideration—Guardianship of Infants Act, 1925 (15 and 16 Geo. 5, c. 45), s. 1.

On June 22, 1951, justices made an order in the wife's favour under the Summary Jurisdiction (Married Women) Acts, granting her (inter alia) the custody of the child of the marriage. On Jan. 9, 1952, the husband's application to revoke or vary that part of the order relating to custody was dismissed by the justices on the ground that, as there was no evidence of misconduct by the wife, in view of the decision in *Cobbe v. Cobbe* (1909) (73 J.P. 208), they had no jurisdiction to interfere with the order.

HELD: since it had been enacted by the Guardianship of Infants Act, 1925, s. 1, that: "Where . . . the custody . . . of an infant . . . is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration . . ." the decision in *Cobbe v. Cobbe* was no longer good law, and, therefore, the justices had misdirected themselves in law and their dismissal of the application must be set aside.

APPEAL by the husband against the dismissal by justices for the Highgate petty sessional division on Jan. 9, 1952, of his application to revoke or vary an order under the Summary Jurisdiction (Married Women) Acts, dated June 22, 1951, made by the same court in the wife's favour, in so far as that order related to the custody of the child of the marriage.

P. A. Bruce for the husband.

Vincent for the wife.

LORD MERRIMAN, P.: This is an appeal by a husband against the dismissal by the justices for the Highgate petty sessional division of his application to revoke or vary an order made in favour of the wife by the same court on June 22, 1951, on the ground of desertion, whereby the husband was ordered to pay maintenance to the wife at the rate of £2 a week, she was given custody of the child of the marriage, and a further sum of 20s. a week maintenance for the child was ordered to be paid by the husband. By his summons the husband wishes to have the order in favour of the wife cancelled so far as it relates to custody, so that, in effect, the custody of the child, a daughter, will revert to him, though, of course, under the Summary Jurisdiction (Married Women) Acts, it is not possible to make a positive order for custody in favour of a husband as would be the case if the summons were under the Guardianship of Infants Acts. It appears that the Highgate justices are no longer the proper tribunal to deal with a summons under the Guardianship of Infants Acts because neither of the spouses is any longer resident in their jurisdiction, and that is why the application took the form it did—an application for the revocation or variation of the existing custody order.

The case raises a pure question of law, which can be simply stated—whether the decision of this court in *Cobbe v. Cobbe* (1), is still law. Before the justices the point was taken for the wife that under that decision they had no jurisdiction to interfere with this order for custody unless evidence were laid before them that the wife had been guilty of misconduct. They accepted that submission, and it is said that they were wrong in doing so. Nobody suggests that the wife has been guilty of any misconduct, giving that word its widest sense and not limiting it

(1) (1909), 73 J.P. 208

only to adultery. What is said is that the decision in *Cobbe v. Cobbe* (1) can no longer be regarded as law, having regard to the express provision of s. 1 of the Guardianship of Infants Act, 1925, whereby:

"Where in any proceeding before any court (whether or not a court within the meaning of the Guardianship of Infants Act, 1886) the custody or upbringing of an infant, or the administration of any property belonging to or held on trust for an infant, or the application of the income thereof, is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father."

The substance of the decision in *Cobbe v. Cobbe* (1) is that when magistrates had once given the custody of a child to a wife under an order which was equivalent to a judicial separation they had no power to transfer the custody of the child to the husband unless there was evidence that the wife had been guilty of some misconduct, and that, as that had not been suggested in that case, an order varying the original order could not stand. It seems to me that, although *Cobbe v. Cobbe* (1) is still referred to in well-known text-books as if it were the law, it cannot now be so because that case decides that on any application to vary a custody order made under the Summary Jurisdiction (Married Women) Acts the overriding consideration, the condition precedent to the granting of the application, is that it should be proved that the wife has been guilty of misconduct, and I understand that there is authority which indicates that the misconduct need not necessarily be adultery.

I do not think that such a decision as that can stand in view of the express wording of s. 1 of the Guardianship of Infants Act, 1925, which says that the paramount consideration shall be something entirely different, namely, the welfare of the child. It is obvious that in certain cases the two issues may conflict, and it is well recognised in LUSHINGTON'S SUMMARY JURISDICTION (MARRIED WOMEN) ACTS, 3rd ed., c. 19, that, for example, a husband may apply to have the whole order set aside under s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, which, unless one or other of the exceptions added to s. 7 by the Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 2 (1), applies, makes it compulsory to discharge the order on proof of an act of adultery since the making of the order. In my opinion, in considering whether, with the maintenance, or the non-cohabitation clause, or whatever else may be in the order, the order for custody should be varied, it would still be necessary to give effect to the paramount consideration: What is in the best interests of the welfare of the child in the circumstances of the case? In my opinion, the decision in *Cobbe v. Cobbe* (1) cannot survive the passing of s. 1 of the Guardianship of Infants Act, 1925. The point, therefore, on which the justices dismissed the husband's summons was a bad point, and the dismissal must be set aside.

PEARCE, J.: Since *Cobbe v. Cobbe* (1) was decided the Guardianship of Infants Act, 1925, has been passed. Section 1 of that Act is deliberately framed in the widest terms to secure consideration of the infant's interest in any court where its custody or upbringing is at stake. In RAYDEN ON DIVORCE, 5th ed., p. 458, *Cobbe v. Cobbe* (1) is still cited as an authority for the proposition that a custody order in favour of a wife may only be varied on evidence of the wife's

misconduct. If that were still the law, the paramount consideration would be whether the wife had committed misconduct, whereas Parliament has deliberately stated that the welfare of the infant shall be the paramount consideration. Since the Act has expressly said that the court shall not take into consideration whether from any other point of view the claim of the father is superior to that of the mother or the claim of the mother is superior to that of the father, the court should not take into consideration the personal right of the mother to retain a custody order that she has obtained, a right that in *Cobbe v. Cobbe* (1) was considered to be the deciding factor. *Cobbe v. Cobbe* (1) is, therefore, no longer good law. In considering whether they shall vary a custody order, the paramount question for the justices is, not the conduct of the parents, but the interests of the child. The conduct of the parents is obviously relevant to this so far as it affects the child, but it is not the deciding factor.

Appeal allowed.

Solicitors: *Pennington & Son*, agents for *Church, Bruce & Co.*, Gravesend (for the husband); *Donovan J. Smalley* (for the wife). G.F.L.B.

(1) (1909), 73 J.P. 208

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., HILBERY AND DEVLIN, JJ.)

REG. v. EAST KERRIER JUSTICES. *Ex parte* MUNDY

May 29, 1952

Justices—Procedure—Retirement of justices—Information with regard to previous convictions conveyed to justices in their room—Retirement of clerk with justices—Certiorari—Conviction quashed.

After justices had retired, with their clerk, to consider their decision, the clerk returned into court, obtained a piece of paper from a police officer (on which, in fact, particulars of a previous conviction were recorded), and took it back with him into the retiring room. On their return into court, the justices announced that they convicted the defendant, but no reference to the contents of the piece of paper was made in open court. The justices heard evidence in court regarding the previous conviction and then fined the defendant.

HELD: that, as justice had not manifestly been seen to be done, inasmuch as neither the defendant nor anyone in court knew the contents of the piece of paper, the conviction must be quashed.

Rex v. Bodmin J.J. Ex p. McEwen (1947) (111 J.P. 47), applied.

Davies v. Griffiths (1937) (101 J.P. 24), distinguished.

Per curiam: The justices' clerk should not retire with the justices when they are about to consider their decision, but should remain in court unless the justices desire to be advised by him on a point of law, in which case they are entitled to send for him.

MOTION for certiorari.

The applicant, Cyril Vivian Mundy, was convicted by a petty sessional court sitting at East Kerrier, Cornwall, of having driven a motor vehicle on a road without due care and attention, contrary to s. 12 (1) of the Road Traffic Act, 1930. He was fined £5, and his driving licence was suspended for three months. He applied for an order of certiorari to quash the conviction on the ground that, after the justices had retired with their clerk to consider their decision, the clerk returned, spoke to a police officer, and took a piece of paper received from him into the retiring room. The justices subsequently returned to the court and announced the conviction. The applicant contended that this invalidated the

conviction because the justices appeared to have received evidence otherwise than in open court.

Laskey for the applicant.

McCreery for the prosecutor.

LORD GODDARD, C.J.: I am not going to comment strongly on the conduct of the justices in this case because, in my view, they intended to act properly, but I think they made a mistake. When they retired, the clerk retired with them. He later came out of the retiring room and was seen to speak to a police officer, from whom he received a piece of paper which he took back with him into the room. The justices then returned into court, and, without saying anything more, they announced that they convicted the applicant and called for evidence of previous convictions, if any. The police officer proved a previous conviction. The clerk told the court the penalty which could be imposed and the justices announced their decision—a fine of £5 and three months' suspension of the applicant's driving licence. It is said that the communication required by the justices and the taking of the piece of paper into their room invalidated the conviction because it was doing something behind the back of the applicant and receiving evidence otherwise than in court. As we pointed out in *Rez v. Bodmin J.J. Ex p. McEwen* (1), it will invalidate a conviction if evidence is given or appears to be given to justices otherwise than in open court because the defendant has no means of dealing with it.

In *Hastings v. Ostle* (2) LORD HEWART, C.J., said:

"It is clear . . . that after retiring to their ante-room to consider their decisions in the first series of cases, the justices sent for alleged information as to previous convictions . . . for fishing offences. It is also clear that they did not send for this information until they had come unanimously to the conclusion that the charges against all of the appellants had been proved. The justices sent for the information with reference to previous convictions of any fishing offences for the purpose of considering what would be the appropriate penalty for each appellant. Their clerk left the room and returned, having received from the superintendent of police information of two previous convictions for this class of offence against two of the appellants, and one against the third appellant. They did not go into the full police reports about the appellants. The justices then returned into court and announced their decision, and the appellants were each fined £5 for that offence. In these circumstances it is quite clear that the justices took a course which they ought not to have done. The proper course to pursue was to have returned into court, when they had decided to convict, and then publicly and openly, in the presence of the appellants, made inquiries into the appellants' previous convictions, in which case the appellants and each of them would have had the opportunity of dealing publicly with the matter."

It seems to me that in that case the court quashed the conviction, not because of information which had been taken into the justices' room, but because, when the magistrates returned into court, they did not require the previous convictions to be proved.

In *Hill v. Tothill* (3), LORD HEWART, C.J., said:

"It appeared that the justices had privately informed themselves of a

(1) 111 J.P. 47; [1947] 1 All E.R. 109; [1947] K.B. 321.

(2) (1930), 94 J.P. 209.

(3) [1936] W.N. 126.

previous conviction of the defendant, when deciding upon the sentence to be imposed, and that on returning into court they convicted and pronounced sentence upon the defendant without requiring the previous conviction to be proved."

That again was held to be a ground for quashing. In *Davies v. Griffiths* (1) the justices, sitting in court and conferring among themselves before they announced their decision, asked for proof of previous convictions. After receiving them they retired and then came back into court and announced the conviction and penalty. The court refused to quash the conviction because everything had been done in open court.

In the present case in the first instance the information with regard to the previous conviction was conveyed to the justices in their room, and that, the court thinks, was wrong and ought not to have been done. Nothing was said in court as to what the justices had sent for, and for all the applicant knew any statement might have appeared on that piece of paper, even (though, of course, it was not) a statement by the police officer of something he had forgotten to say in evidence. The justices after receiving it came back into court and asked for formal proof of the previous conviction, and in that they were acting quite rightly. It is possible that, if they had announced in court at the time that the only piece of information which had been conveyed to them was the fact of that previous conviction and that they had made up their minds before then to convict, we might have dealt with the case as the court did in *Davies v. Griffiths* (1), but that was not done. In fact, until the affidavit in this case was filed by the justices the applicant did not know what had happened, and, in particular, he did not know that the justices had made up their minds to convict before the information with regard to the previous conviction had been conveyed to them. In those circumstances, and not without some hesitation, I have come to the conclusion that we ought to quash this conviction.

Another matter which I feel bound to mention is this. Although I cannot for the moment trace the authority, I think it has certainly been said more than once in this court that it is not right that the justices' clerk should retire with the justices. It has been said over and over again that the decision must be the decision of the justices, not the decision of the justices and their clerk, still less the decision of the clerk, and, if the clerk retires with the justices, people will inevitably form the conclusion that the justices' clerk may influence the justices, or may take some course which it is for the justices alone to take. The justices can always send for the clerk if they require advice on a point of law because that is what the clerk is there for, but it is not desirable, and it is not, I would say, regular, for a clerk to retire with justices as a matter of course at the time they are considering the facts. He should remain in the court until the justices either return into court or send for him. Whether we should have quashed the conviction on the ground that the justices' clerk retired with them (although I believe it has been done in one case), I need not say. But we think it is undesirable and we hope that in future justices' clerks will not retire with their bench, unless their advice is required. For these reasons I think the conviction should be quashed.

HILBERY, J.: I have felt the greatest doubt whether we should quash this conviction, but my Lord's analysis of the cases and the reasons which he has given have persuaded me that we should take that course, and I, therefore, agree.

(1) 101 J.P. 247; [1937] 2 All E.R. 671.

DEVLIN, J.: I agree, also after some little hesitation because I think the authorities on the matter are not entirely clear, but I agree entirely with everything the Lord Chief Justice has said. I should like to state what I believe to be the principle on which the court is acting. We are not dealing with a case of actual injustice. If we were, that would be the end of the matter, and clearly the conviction would be quashed. We are dealing with an infringement of the rule that justice must not only be done, but must also manifestly appear to be done, and, accordingly, we are dealing with matters of form. The courts have held in the past that it is important not only that justice should be done, but also that it should be seen to be done, and that a person who has been found guilty by the justices should know there has been no actual injustice. It is preferable that he should go free rather than that that rule should be infringed. When the court is considering whether to quash a conviction or exercise its discretion in upholding it in a case of this kind, what is important is what appears to have been done in the course of the proceedings, and that is why I think *Davies v. Griffiths* (1), which at first sight appears to be very similar to this case, is rightly distinguished by counsel for the applicant by the course that was taken there. In that case, too, the justices considered previous convictions when they retired, but when they came back a point was taken in court, and the report says that the solicitor appearing for the appellant

"objected that the course [the justices] had adopted in not announcing in court [their] decision to convict before hearing the previous convictions was irregular, but [they] informed him that [they] had come to a decision during [their] first retirement before [they] had been acquainted with the appellant's previous convictions."

In other words, the error was publicly corrected, and no person who sat in the court, unless he was going to suggest that the justices had acted in bad faith (and that was not suggested), could have left after the hearing under the impression that some injustice had been done. If he believed the statement made in open court, then no injustice had been done. The error of form, if I may so put it, was publicly put right in the course of the proceeding which he had heard. The vital distinction here, to my mind, is that the error was not put right. The matter was not raised in court. The applicant was defending himself, and, on the face of it, as my Lord has said, it appeared that some piece of paper, nobody knowing what it contained, had been taken into the justices which might have influenced them in arriving at their decision. An order of certiorari is the natural step to take in such case and it was not until the affidavit was given this morning to counsel for the applicant that anybody knew what the justices' explanation was. That explanation, which the court has unhesitatingly accepted, shows that the error was made in good faith, but, as it was not given in open court at the time of the proceedings, it leaves those proceedings still tainted with the fact that an injustice was apparently done. On those grounds I agree that the conviction should be quashed.

Order for certiorari granted.

Solicitors: *Balderston, Warren & Co.*, agents for *R. C. Henderson*, Falmouth (for the applicant); *Barlow, Lyde & Gilbert*, agents for *Stephens & Scown*, St. Austell (for the respondents).

T.R.F.B.

(1) 101 J.P. 247; [1937] 2 All E.R. 671.

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PROBATE, DIVORCE AND ADMIRALTY DIVISION

(LORD MERRIMAN, P., AND PEARCE, J.)

May 5, 1952

LOWRY v. LOWRY

Justices—Husband and wife—Maintenance order—Husband resident in Northern Ireland—“Last ordinarily resided together as man and wife in England”—Maintenance Orders Act, 1950 (14 Geo. 6, c. 37), s. 1 (1).

The parties were married in England in 1938 and lived in London thereafter. In 1941 they went to live in Ireland, but in 1942, while on seven days leave from the Royal Air Force, the husband brought the wife back to the house in London where they had previously lived. The parties drifted apart, but in 1947 the husband rejoined the wife at the house in London and they occupied the same bedroom for two nights. The husband then left the wife on the understanding that he would return to his work and that she would join him at the place where he was sent by his employers. The wife never heard again from the husband who now resided in Northern Ireland. On a summons by the wife alleging desertion by the husband,

HELD: (i) in 1947 the parties “last ordinarily resided together as man and wife in England” within the Maintenance Orders Act, 1950, s. 1 (1), and, therefore, the court of summary jurisdiction had jurisdiction to deal with the summons; (ii) there was evidence from which the court could find the husband guilty of desertion.

PER LORD MERRIMAN, P.: “‘Residing together as man and wife’, in the language of the Divorce Court, is sometimes called cohabiting, and I am bound to say that I should find a great deal of difficulty in distinguishing between residing together as man and wife and cohabiting. I do not think one carries it any further by paraphrasing it, but I suppose the words ‘last ordinarily resided together as man and wife in England’ could be paraphrased by saying that the matrimonial home at which they last cohabited was in England.”

APPEAL by the husband against a decision, dated Feb. 12, 1952, of the metropolitan magistrate sitting at Tower Bridge, whereby he was found guilty of the desertion of his wife.

Leonard Halpern for the husband.

W. G. Wingate for the wife.

LORD MERRIMAN, P.: This is a husband's appeal from a decision of the learned metropolitan magistrate sitting at the Tower Bridge magistrate's court, who, on Feb. 12, 1952, made an order against him on the ground that he had deserted his wife. This decision is challenged on several grounds. It is said, first, that the learned magistrate had no jurisdiction to deal with the case, and, secondly, that, supposing she had jurisdiction, the facts did not warrant a finding of desertion.

The serious matter is the question of jurisdiction. Under the Maintenance Orders Act, 1950, s. 1 (1), an English court of summary jurisdiction has jurisdiction (which it did not possess before, having regard to certain very clear decisions to that effect), to make against a man living in Scotland or Northern Ireland orders for maintenance on behalf of a wife. That the husband in this case resides in Northern Ireland cannot be doubted, and the wife resides in England, but the wife must also show that the parties last ordinarily resided together as man and wife in England. Those are the words which are crucial in this case. The learned magistrate has found that these persons did last ordinarily reside together as man and wife in England. That was on an occasion in 1947, when, by no means for the first time, they resided together at the house of the wife's mother in London. The learned magistrate has also held that it was from the matrimonial home that the husband deserted the wife. If it be a fact that

these parties last ordinarily resided together as man and wife at the mother's address in England, in my view, there can be no argument that the parting had the quality of desertion on the part of the husband, as the learned magistrate has found.

I will confine myself now to the important question whether it can truly be held that these parties "last ordinarily resided together as man and wife in England". The words "ordinarily reside" or "ordinarily resident" have a familiar ring. They have been interpreted in connection with liability to assessment to income tax, and the best known case on the subject is *Levene v. Inland Revenue Comrs.* (1). Without discussing the details of that case, I think I can say that these principles emerge—(i) that as a matter of law it is extremely difficult, if, indeed, it is possible, to distinguish between "residence" and "ordinary residence"; and (ii) a finding one way or the other is a finding of fact which is not to be disturbed if there is evidence to support it. That principle applies *mutatis mutandis* to the present matter, and, unless the decision of the learned magistrate that these parties last ordinarily resided together as man and wife in England has no evidence to support it, our duty is to uphold it. The words with which we are concerned here differ from the corresponding phrase in the Income Tax Acts and other provisions in which the words are used, inasmuch as they introduce the element which is contained in the words "together as man and wife". Not merely must they have resided and ordinarily resided, but they must have resided together as man and wife, and it must be true to say of the last occasion when that can be said of them that that event took place in England. "Residing together as man and wife", in the language of the Divorce Court, is sometimes called cohabiting, and I should find a great deal of difficulty in distinguishing between residing together as man and wife and cohabiting. I do not think one carries the matter any further by paraphrasing it, but I suppose the words "last ordinarily resided together as man and wife in England" could be paraphrased by saying that the matrimonial home at which the parties last cohabited was in England.

It so happens that the house of the wife's mother was the first matrimonial home and also the matrimonial home on many later occasions. The husband, who comes from Southern Ireland, came to England in 1935 and joined the Royal Air Force, and when the parties were married in England in 1938 they lived for the next three years at the home of the wife's parents, the husband visiting the wife there at week-ends and when he was on leave. In 1941 they went to live for a time with a sister-in-law of his at Newbury and then to Dundalk in Ireland. In the course of his duties in the Royal Air Force the husband had been transferred to Antrim, whence he visited his wife at Dundalk when he was on leave, and at Dundalk, in December, 1941, the second child of the marriage was born. In 1942 the husband, having seven days' leave, took his wife back to her mother's house in London, the place which had been the matrimonial home. Then they appear to have drifted apart. The husband said that he gave up his wife's company because her mother had too much influence on her. In the course of his work after demobilisation he went to America. There is said to have been some correspondence, but no letter was produced. At any rate, on his return from America, in or about 1947, the husband re-joined the wife at her mother's house. The learned magistrate has found that they were reconciled. There was evidence that they slept together there as man and wife, and the matter was left, according to the wife, that she would go with him wherever he could find a home for her, which would depend to some extent on where his next job was.

(1) [1928] A.C. 217.

He left her to go to his work, and she has not heard from him since, except that he sent her 30s. a week for the two children. That is the desertion complained of. The cohabitation in 1947 is what the learned magistrate has found was their last residence together as man and wife.

It has been said that there is no evidence to support that, because there was no element of permanence in this residence, nothing which, in the words of HARMAN, J., in *Re Adoption Application No. 52/1951*, (1), an adoption case, could be regarded as a headquarters which had any air of permanence about it. Therefore, it is argued it was not open to the learned magistrate to hold that there was a residence together as man and wife. I do not agree. I think there is evidence, and I think that it is very important to bear in mind what it is that the learned magistrate has found about this reconciliation. She has, in effect, accepted the evidence of the wife that these two people deliberately resumed cohabitation as man and wife on the terms and in the expectation that where his employers ordered him to go he would settle down and she would join him there. I see no reason to suppose that that meant anything but a continuance of this resumed cohabitation in England. I do not say that it was necessarily stipulated that it should be in England, but everything shows that was what was expected. There was some suggestion by the husband that the understanding was that they must go and live at Dundalk, but the wife does not accept that as true.

In *Mummery v. Mummery* (2), if I may quote a passage from my own judgment, I said something to the effect that the whole question turns on what a resumption of cohabitation means, and continued:

"Now, LORD MERRIVALE said more than once that no judge has ever attempted a comprehensive definition of desertion and that no judge would ever succeed in doing so. Amongst the descriptions of desertion which he gave was one which has always appealed to me. He said that desertion was a withdrawal, not from a place but from a state of things (*Pulford v. Pulford* (3) [1923] P. 21). Similarly, I doubt whether any judge could give a completely exhaustive definition of cohabitation and certainly I am not going to attempt to do so. At least a resumption of cohabitation must mean resuming a state of things—that is to say, setting up a matrimonial home together. That involves, so it seems to me, a bilateral intention on the part of both spouses so to do."

I think that there is ample evidence that when the husband re-joined the wife in circumstances which the learned magistrate has found effected a reconciliation between them there was a bilateral intention of setting up a matrimonial home together which did not merely consist in staying for a night, as a lodger in a particular set of rooms or in one room, but had an element of permanence about it, and there was a further intention of continuing that cohabitation elsewhere, wherever his employers should send him and he was able to settle down, on the understanding that the part of the world in which that would occur would still be England, though not necessarily in London. That being so, I think the learned magistrate had ample evidence on which to found jurisdiction to decide this case. In my opinion, she rightly found desertion, and I think this appeal fails and should be dismissed.

PEARCE, J.: I agree with all that my Lord has said. In *Levene's case* (4), in dealing with the words "ordinarily resident" for the purposes of the Income

(1) 115 J.P. 625; [1951] 2 All E.R. 931; [1952] Ch. 16.

(2) [1942] 1 All E.R. 553; [1942] P. 107.

(3) [1923] P. 18.

(4) [1928] A.C. 217.

Tax Acts, VISCOUNT CAVE, L.C., pointed out that in such cases the question is always one of fact and degree. "Ordinary residence is a thing which can be changed in a day" said SOMERVELL, L.J. in *Macrae v. Macrae* (1). The question has to be decided in the light of all the circumstances. In considering whether there has been enough of the quality of continuity and permanence in the two nights that the husband spent with the wife in 1947, one must remember that the income tax cases deal with different words from those which we have in this case which are, "ordinarily resided together as man and wife". A night spent at an address by a solitary traveller does not carry so much weight or consequence as that spent by a husband who returns to and is reconciled with a wife in the home where they have lived together before their estrangement. The husband in such a case has returned, not only to an address, but also to a state of things. In my view, it is impossible to say that there was no evidence in this case on which the learned magistrate could properly come to the decision at which she arrived. For these reasons I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Teff & Teff* (for the husband); *Philcox, Sons & Edwards* (for the wife).

[Reported by G. F. L. BRIDGMAN, Esq., Barrister-at-Law.]

(1) 113 J.P. 342; [1949] 2 All E.R. 34; [1949] P. 397.

COURT OF APPEAL

(SINGLETON, BIRKETT AND HODSON, L.JJ.)

Mar. 26, 1952

WALKER v. WALKER

Divorce—Desertion—Parties living under same roof—Occupation of separate rooms — Wife performing no household duties for husband — No verbal communication.

The husband and the wife were married in 1918. From 1945 until the husband presented a petition for divorce in 1951 on the ground of his wife's desertion, the parties lived in the same house, but the wife withdrew into a separate bedroom which she kept locked. She performed no household duties for the husband, who had to do his own washing, mending, and ironing. As his wife would do no cooking for him, the husband had his meals out as often as possible, and only cooked for himself on Sunday mornings, always at a time when the wife was not using the kitchen herself. When the parties wished to communicate with one another, they did so by written notes. The wife rejected an attempt by the husband at reconciliation, saying that she was not coming back to live with him.

HELD: the facts were such that the parties were not living together in one household, and the wife had deserted the husband.

Smith v. Smith ([1939] 4 All E.R. 533), applied.

APPEAL by the husband from an order of Mr. Commissioner BLANCO WHITE, K.C., dated Dec. 7, 1951, dismissing the husband's petition for divorce on the ground of his wife's desertion. The learned commissioner found on the facts that there was not such a degree of separation between the parties as to constitute two households. The husband appealed.

L. J. A. Pile for the husband.

The wife did not appear.

SINGLETON, L.J.: I will ask **BIRKETT, L.J.**, to give the first judgment.

BIRKETT, L.J.: This is an appeal from a judgment of Mr. Commissioner **BLANCO WHITE, K.C.**, given on Dec. 7, 1951, dismissing the petition of the husband for a decree of divorce on the ground of his wife's desertion.

Describing his relations with his wife, the husband said in evidence that in 1945:

"She separated from me. She deserted me. It is true that we lived under the same roof, but nevertheless she deserted me. She occupied her own bedroom upstairs and locked it."

The learned commissioner accepted the truthfulness of the husband, who, therefore, established that there was that separation to start with, namely, that the wife occupied a separate bedroom upstairs while he occupied a separate bedroom downstairs, and they both locked their doors. The husband further said: "She did nothing for me at all", and the learned commissioner elucidated the rather pitiful facts that the husband had to do the washing of his clothes himself—his shirts and collars—the ironing, and, presumably, the mending; he had to cook for himself and was driven to have his meals out as often as he could, even on a Sunday night. Apparently, the only cooking that he did in the house was on Sunday morning when he prepared his dinner. He did that always at a time when the wife was not using the kitchen. When they wanted to communicate with one another, it was done by little notes, and a small collection of those notes was put before the learned commissioner to indicate the degree of severance which had taken place between these parties. The husband said that there was an occasion when he had asked his wife if there was any chance of a reconciliation so that they could live together again. He said:

"Yes, I asked her how long this was going on, and she said: 'If you think I am coming back to live with you, then you have got another think coming'".

That language is not unimportant—"If you think I am coming back"—meaning quite clearly, I should have thought, "I have gone away from you", and I think it may be said: "I have deserted you"—"then you have another think coming." The husband also said that his wife locked the coal-house and he had to buy an electric fire. As indicating the complete severance between the two I will refer to these questions and answers:

"Q.—Did she ever have dinner with you? A.—No. Q.—Did she ever offer you —? A.—Never once. Q.—Did your wife contemplate moving somewhere else? A.—Yes. Q.—How did you come to know about that? A.—Well, a neighbour of mine — Q.—You cannot tell us what the neighbour told you. A.—Well, she had bought a house in September. Q.—Had your wife bought a house? A.—Yes, either the wife, or the boy between them, but that was in September."

There was evidence that she had been earning money and that the son was earning money and contributing.

What is the effect of the authorities? *Wilkes v. Wilkes* (1) decided by **HODSON, J.**, as a judge of first instance and later approved in the Divisional Court and in the Court of Appeal, affords some guidance, although the facts of one case can never afford a complete parallel with the facts of another. In that case for more than a year preceding the husband's actual departure from his wife the parties were living under the same roof, but during the whole of that

(1) [1943] 1 All E.R. 433; [1943] P. 41.

time they had no common life. The husband, after saying to his wife in March, 1937: "This is the end", never slept with her again, and he refused to share her sitting-room or to have meals with her. All those things were present in the present case, except for the fact that the wife paid the instalments due on a mortgage of the house which was in the husband's name, and the husband from time to time took food from the wife's store and ate it. The lives of the husband and wife were separate; the wife's attempts at reconciliation were at all times refused; and HODSON, J., held that the common home had been put an end to by the husband more than a year before he left the house and that the wife's case for desertion was proved. In his judgment HODSON, J., said:

"In the circumstances I think that the case falls on the same side of the boundary line as *Smith v. Smith* (1), rather than on the other side of the line, on which falls *Littlewood v. Littlewood* (2) . . . I find that the common home had been put an end to by the husband in March, 1937. At that moment the marriage had come to an end; even although he did not actually leave the house until over a year later. The wife has made out a case of desertion . . ."

In *Hopes v. Hopes* (3) BUCKNILL, L.J., said:

"In *Angel v. Angel* (4), LORD MERRIMAN, P., in giving judgment in the Divisional Court on an issue of desertion, referred to *Smith v. Smith* (1) and *Wilkes v. Wilkes* (5), and said that these cases were rightly decided as instances of what must necessarily be the rare class of case where it is possible for one spouse or the other to assert desertion in spite of the fact that the spouses are physically living in the same house."

In *Wanbon v. Wanbon* (6) PILCHER, J., said:

"It is very rare, I think, that the court can find facts on which it is proper to order a decree nisi in a desertion case where the parties have lived not only under the same roof but in the same household in the way these parties have lived. There have, of course, been cases where husband and wife have occupied different storeys in the same house where it has been held that the one has deserted the other, although they have been living under the same roof. In this case, although there was only one household, I am satisfied on the facts that the petitioner is entitled to the decree nisi which he seeks."

In *Hopes v. Hopes* (3) BUCKNILL, L.J., said:

"I must respectfully say that I find it difficult to reconcile this case [*Wanbon v. Wanbon* (6)] with the principle laid down in the cases as to what constitutes desertion."

DENNING, L.J., said, apparently interpreting the words "one household" (*ibid.*, 925):

"If that means that, although living at arms' length, they were still sharing the same living room, eating at the same table and sitting by the same fire, then I cannot agree with the finding of desertion."

HARMAN, J., said that the leading case, and the real test, was *Smith v. Smith* (1).

(1) [1939] 4 All E.R. 533; [1940] P. 49.

(2) [1942] 2 All E.R. 515; [1943] P. 11.

(3) 113 J.P. 10; [1948] 2 All E.R. 920; [1949] P. 227.

(4) 111 J.P. 14; [1946] 2 All E.R. 635.

(5) [1943] 1 All E.R. 433; [1943] P. 41.

(6) [1946] 2 All E.R. 366.

The last case to which I want to refer is *Baker v. Baker* (1), a decision of WILLMER, J. In that case on an undefended petition for divorce brought by a husband against his wife on the ground of desertion it was proved that for more than three years before the presentation of the petition the parties had lived in the same house, which belonged to them both, but each occupied a separate bedroom and sitting-room and cooked their own food separately. During that time the husband had not paid any allowance to the wife. They shared the kitchen and the passages and other parts of the house and did not speak except for the business necessities of the day. On these facts it was held that it could not be said that the parties had ceased to be one household and had become two separate households, and, therefore, desertion had not been proved. Clearly that was a finding of fact, and so the question before us on the undisputed facts, is: Is this a case where there has been two households in the language used in the authorities? In *Smith v. Smith* (2) SIR BOYD MERRIMAN, P., said:

"I have come to the conclusion that this case is on what I may call the *Powell v. Powell* (3) side of the line rather than the *Jackson v. Jackson* (4) side of the line, and that, in circumstances in which it is impossible to describe the parties as living together—indeed, where the only element of living together is that they were actually existing in one house, though there was no physical separation between the parts of the house in which they were living—the case is one of desertion, and is not one in which the wife is precluded from asserting desertion by the mere fact that they were residing in the same house."

If *Smith v. Smith* (2) is the leading case, how do the facts in this case stand in relation to it? The only element of living together was that the husband and the wife were actually residing in one house and there was no physical separation between the parts of the house in which they were living. They were compelled to cook their meals in the same kitchen, and the only thing the husband did in that way was to cook his meal on Sunday morning at some time different from the time at which the wife used the kitchen. To say that these people were in any sense living together—that in any sense there was one household—is impossible on the facts in this case. There was the imperative need to use the same kitchen, as, indeed, for all I know, there was the imperative need to use the same water closet or anything else which was essential, but in no other sense could it be said here that there was one household. In my judgment, on the facts as found by the learned commissioner, there ought to have been a decree.

HODSON, L.J.: I agree.

SINGLETON, L.J.: I agree.

Appeal allowed.

Solicitors: *Webster, Butcher & Johnson* (for the husband).

C.N.B.

(1) 116 J.P. 91; [1952] 1 All E.R. 297.

(2) [1939] 4 All E.R. 533; [1940] P. 49.

(3) [1922] P. 278.

(4) [1924] P. 19.

PROBATE, DIVORCE AND ADMIRALTY DIVISION

(LORD MERRIMAN, P., AND PEARCE, J.)

Apr. 25, 1952

DOWELL v. DOWELL

Husband and Wife—Maintenance—Wilful neglect to maintain—Maintenance agreement—Covenant by wife not to sue providing payments punctually made—No default in payment—Deterioration in wife's financial position.

On Dec. 22, 1949, a husband and wife entered into an agreement whereby the husband agreed to pay a certain sum each week as maintenance for the wife and for the child, and the wife undertook not to take any proceedings for maintenance so long as the payments were punctually made. Owing to ill-health the wife was forced to give up work and asked the husband for an increase of maintenance. The husband refused to accede to this request, but at no time was he in default in his payments under the agreement. On a summons by the wife alleging that he was guilty of wilful neglect to maintain,

HELD: the punctual performance of the obligation to make weekly payments was not conclusive of the matter, and the wife was entitled to have the amount reviewed in the light of the existing circumstances.

Tulip v. Tulip ([1951] 2 All E.R. 91), applied.

APPEAL by the husband against a decision, dated Jan. 16, 1952, of the justices for the Woodbury petty sessional division of Devon whereby they found him guilty of wilful neglect to provide reasonable maintenance for his wife and child.

Besley for the husband.

P. M. Wright for the wife.

LORD MERRIMAN, P.: This is an appeal by a husband from a decision of the justices for the Woodbury petty sessional division of Devon sitting at Exmouth, given on Jan. 16, 1952, whereby they found the husband guilty of wilful neglect to provide reasonable maintenance for his wife and the child of the marriage, and ordered him to pay the sum of £3 a week for the wife and £1 a week for the child, of whom she was awarded the custody. The case raises in a neat form the question which was discussed in the Court of Appeal in *Tulip v. Tulip* (1). This marriage, which took place in September, 1926, had for many years been drifting to disaster, and on Dec. 22, 1949, the parties entered into an agreement. It was not a separation agreement. It was simply a maintenance agreement under which the husband agreed to pay, and the wife agreed to accept for her support and maintenance, the weekly sum of £2 for joint lives *dum casta*, with an additional sum of 10s. a week for the support and maintenance of the child. The date of the first payment was stipulated, and the wife covenanted out of that weekly sum of £2 10s. in all, or otherwise, to support and maintain herself and child, indemnify her husband against all debts, and so forth, and not in any way at any time to pledge the husband's credit. She also more particularly agreed that so long as he should punctually make the weekly payments mentioned she would not commence or prosecute any proceedings against the husband in respect of the maintenance of herself and the child, but with the stipulation that, on the husband's failure to make the payments as and when the same became due, the wife should be at full liberty at her election to pursue all and every remedy in this regard either by enforcement of the provisions of the agreement or as if the agreement had not been made. In other words, she had the option to sue on the agreement or to adopt any other legal remedy that was open to her. In spite of the punctual performance of his obligations under the agreement,

(1) [1951] 2 All E.R. 91.

on Dec. 11, 1951, almost two years after the signing of the agreement, the wife took out the summons on which this order was made, charging the husband with wilfully neglecting to provide reasonable maintenance for her and for the infant child whom the husband was legally liable to maintain. It is clear that, though nothing was said one way or the other about the obligation of the wife to work or her intention of working, it was contemplated that she might support herself by work, for the arrangement was that she should support herself out of the specified sum "or otherwise", and, in fact, she did go to work. By the summer of 1951, owing to health reasons, she was unable to go on working, and from the point of view of her own ability to supplement this amount, there was a change of circumstances for the worse. Meanwhile, the husband was carrying on a business in partnership with his father, and as a result of under-drawings had accumulated a considerable share in the capital of the business. In other words, the justices came to the conclusion that, whereas the wife's circumstances had changed for the worse, the husband's potentialities, at any rate, were a good deal better than he would have them believe.

The question arises whether a man who has punctually performed obligations to pay an agreed sum of money, settled so recently as two years ago, for the maintenance of his wife and child, a sum which, admittedly, was fixed with the help of a solicitor who acted for both parties with perfect propriety, the wife expressly stating at the time that she was entirely contented with it, can fairly be said wilfully to have neglected to provide reasonable maintenance for the wife and the child for whom specifically this sum was provided. By a letter dated Nov. 12, 1951, the wife demanded an increase of maintenance. The letter said that she found that the allowance of £2 10s. a week which was being paid to her under the deed was insufficient to maintain her and the child. The gist of it is in the sentence:

"Our client is unable to work to support herself. Unless your client is prepared to increase the payments we are instructed to apply to the justices for an order."

Within a month the application was made. Meanwhile, there had been no sort of answer on the husband's part to that request, so, if it was a reasonable request in the circumstances, there is, at least, *prima facie* evidence of a wilful neglect.

The whole matter was so fully reviewed in *Tulip v. Tulip* (1), in which a decision of this court in *Morton v. Morton* (2) was approved, that it would be idle to go through it at length. Manifestly, we are bound by that decision, and the justices recognised, as I think, that they were bound by it and they attempted to apply it. The point of the decision is that, important as is the fact of an agreement between parties settling an amount of maintenance, and, in particular, settling it so recently as had been done in this case, and even more important as is the fact that the agreement has been punctually and faithfully performed, both the justices and the Divorce Division, under the provisions of the Law Reform (Miscellaneous Provisions) Act, 1949, s. 5 (1), now re-enacted in the Matrimonial Causes Act, 1950, s. 23 (1), have jurisdiction to deal with the question of wilful neglect to provide reasonable maintenance. The jurisdiction is absolute, and cannot be bargained away, but it is a question for the discretion of the court in each case, taking all the circumstances into account, whether there has been wilful neglect to provide reasonable maintenance in spite of the punctual performance of the agreement. In my view, it would be very difficult for us to differ from the conclusion at which the justices have arrived on the facts of this case. They

(1) [1951] 2 All E.R. 91.

(2) 106 J.P. 139; [1942] 1 All E.R. 273.

fully recognised that the punctual payment of the agreed sum is very strong evidence that reasonable maintenance has been provided, but that it is only very strong evidence and is not conclusive, and, after recognising that the onus on the wife is high, they conclude by saying that, in view of the facts they have found to exist in this case and the circumstances of the wife's position at the date of the application, the husband had wilfully neglected to provide reasonable maintenance, and, therefore, they ordered him to pay the sum I have already mentioned, which, in substance, is an increase of 30s. in all over the amount provided by the agreement. It is plain that the points to which they attributed most importance were the ill health of the wife, which had compelled her to give up her work as a cook, and the lack of candour in the account given by the husband and by his father of the husband's financial position, and they also were plainly influenced by the fact that a man who was himself in a great deal better position than he pretended to the court was content to rest on this agreement, although to his knowledge his wife had been obliged to have recourse to public assistance. It being unquestionable that the matter was at large to the justices, I am not prepared to interfere with the way in which they have exercised the discretion entrusted to them, and I think this appeal fails.

PEARCE, J.: I agree with all that my Lord has said. The justices have given their reasons in a clear, careful and comprehensive judgment. They rightly founded themselves on the principles set out by the learned President in this court in *Morton v. Morton* (1) and by the Court of Appeal in *Tulip v. Tulip* (2) which approved *Morton v. Morton* (1). Once the correct principles are applied, as they have been in this case, the matter becomes a question of fact. In my view, there was evidence on which the justices could come to the conclusion at which they did, and I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Nicholls & Nicholls*, Exmouth (for the husband); *Arnold Carter & Co.*, agents for *Dunn & Baker*, Exeter (for the wife).

G.F.L.B.

(1) 106 J.P. 139; [1942] 1 All E.R. 273.

(2) [1951] 2 All E.R. 91.

CHANCERY DIVISION

(DANCKWERTS, J.)

May 7, 1952

Re THACKRAY'S AGREEMENT

Town and Country Planning—Development—Consent of local authority to erection of buildings—Agreement in writing under Town and Country Planning Act, 1932 (22 and 23 Geo. 5, c. 48), s. 34 (1)—Building not commenced before appointed day—Whether permission required under Town and Country Planning Act, 1947 (10 and 11 Geo. 6, c. 51), s. 12 (1).

On Mar. 28, 1933, the Minister approved a scheme prepared by a borough council as local planning authority. Paragraph 40 of the scheme provided that the planning authority might enter into agreements for the purpose of carrying the scheme into effect. On July 24, 1937, the council entered into an agreement with T., a landowner, which was expressed to be made under the Town and Country Planning Act, 1932, s. 34 (1). By the agreement the council consented to the erection on T.'s land of certain specified buildings, and T. agreed to submit plans for the approval of the council before the erection of the buildings and that the land should be permanently subject to the conditions restricting the planning development and the use thereof contained in the schedule to the agreement. After the appointed day (July 1, 1948) under the Town and Country Planning Act, 1947 (which repealed the Act of 1932 and substituted the county council for the borough council as planning authority) T. desired to proceed with the erection of the buildings and claimed that, as the consent contained in the agreement had not been revoked, planning permission under s. 12 (1) of the Act of 1947 was not required, and, consequently, no development charge was payable under s. 69 (1).

Held: although, by virtue of para. 10 of sched. X to the Act of 1947 and reg. 10 of the Town and Country Planning (Transfer of Property and Officers and Compensation to Officers) Regulations, 1948, made under s. 101 of the Act, and the provisions of s. 38 (2) of the Interpretation Act, 1889 (relating to the preservation of rights acquired under a repealed enactment), the agreement remained effective and enforceable, yet the consent in the agreement, being given under the Act of 1932, was of very limited effect and did not amount to a permission as required under s. 12 (1) of the Act of 1947, and, therefore, it was necessary for T. to obtain permission under s. 12 (1) and pay a development charge under s. 69 (1).

ADJOURNED SUMMONS to determine (i) whether on the construction of (a) an agreement in writing made on July 24, 1937, between the plaintiff, of the one part, and the mayor, aldermen and burgesses of the borough of Ealing (the planning authority), of the other part, and (b) the Town and Country Planning Act, 1947, s. 12 (1), and sched. X, para. 10, the plaintiff was entitled to carry out the operations and changes of use specified in para. 1 of the said agreement without any permission under the said Act; and (ii) whether the plaintiff was entitled to carry out the operations and changes of use specified in para. 1 of the said agreement without being required to pay to the defendants under Part VII of the said Act any development charge in respect of such operations or changes of use.

Heathcote-Williams, Q.C., and R. H. Bernstein for the plaintiff, the landowner.
Denys B. Buckley for the defendants, the Central Land Board.

DANCKWERTS, J.: This application raises two questions under the Town and Country Planning Act, 1947. They are: (i) whether permission was required for certain development which the plaintiff wished to carry out under that Act, and (ii) whether a development charge was payable under the provisions of the Act in question. The second question depends on the answer to the first. That appears from the provisions of s. 69 of the Town and Country Planning Act, 1947, which provides:

"(1) Subject to the provisions of this Act, there shall be paid to the Central Land Board in respect of the carrying out of any operations to which this Part of this Act applies, and in respect of any use of land to which this Part of this Act applies, a development charge of such amount (if any) as the board may determine . . . (2) This Part of this Act applies to all operations for the carrying out of which planning permission under Part III of this Act is required, and to all users of land for the institution or continuance of which such permission is so required."

So it is plain that, if permission is required under the provisions of the Act, the exaction of a development charge must follow. The Ealing Borough Council were the planning authority for the relevant area under the Town Planning Act, 1925, and the Town and Country Planning Act, 1932, but under the Town and Country Planning Act, 1947, the Middlesex County Council have been substituted for the borough council.

Under the Town Planning Act, 1925, s. 1 and s. 2, power was conferred on the borough council to make town planning schemes, and those provisions were continued by the Town and Country Planning Act, 1932, s. 54. On Mar. 28, 1933, a scheme prepared by the borough council was approved by the Minister. In para. 28 of that scheme there are provisions as to the character of the buildings which were to be erected, and para. 40 of the scheme provides that the local authority may enter into agreements for the purpose of carrying the scheme into effect. On July 24, 1937, such an agreement was entered into between the borough council and the plaintiff, Mr. James Deighton Thackray, and that agreement is expressed in the recital to have been made pursuant to the Town and Country Planning Act, 1932, s. 34, and all other powers them enabling. The Town and Country Planning Act, 1932, s. 34 (1), enables local authorities to enter into agreements with landowners to impose restrictions on the land held by the latter, and it further enables local authorities to enforce such agreements in a way which was not previously possible because of the decisions relating to restrictive covenants—in particular, *London County Council v. Allen* (1)—that to enforce a covenant against other than the covenantor a covenantee must be interested in neighbouring land to which the benefit of the covenants could be attached. Section 34 (1) has been said by the Court of Appeal in *Ransom & Luck, Ltd. v. Surbiton Borough Council* (2) to be strictly limited, and it was held in that case that the section could not prevent a planning authority exercising such powers of revocation as they had under the Town and Country Planning (Interim Development) Act, 1943.

The agreement in the present case provides by cl. 1:

"Subject to the terms hereinafter mentioned the council hereby consent to the erection of fourteen buildings each consisting of a shop on the ground floor with two self-contained residential flats over on the said land (other than [an open space.])"

Clause 2 provided that the owner, i.e., the plaintiff, was to submit plans for the approval of the council when he came to carry out his erection of the buildings. By cl. 4 the plaintiff agreed that:

"the said land shall be permanently subject to the conditions restricting the planning development and use thereof contained in the schedule hereto and that such restrictions shall be enforceable by the council against the owner and persons deriving title under him in like manner and to the like extent."

(1) 78 J.P. 449; [1914] 3 K.B. 642

(2) 113 J.P. 95; [1949] 1 All E.R. 185; [1949] Ch. 180

It was contended on behalf of the plaintiff that that consent to the erection of the buildings is still effective, and, therefore, he, now desiring to proceed with the erection of the buildings, is not liable to obtain any permission under the Town and Country Planning Act, 1947 (although it appears to be the fact that such permission has been obtained), and, therefore, it follows that no development charge is payable by him in the circumstances. It is not contended on behalf of the plaintiff that the Ealing Borough Council, or, it must follow, I think, the Middlesex County Council, are prevented from revoking the permission or consent which is contained in that agreement, but it is pointed out that such permission or consent has not been revoked, and, therefore, it is said that it is still effective having regard to the provisions of the Town and Country Planning Act, 1947.

I have referred to s. 69 of the Act of 1947 which imposes a development charge, except in the case which is mentioned in s. 80, i.e., land which is ripe for development and with regard to which there has been a building contract entered into (which cannot apply in the present case). Section 12 of the Act is most important. It provides, under sub-s. (1):

"Subject to the provisions of this section and to the following provisions of this Act, permission shall be required under this Part of this Act in respect of any development of land which is carried out after the appointed day."

The appointed day was July 1, 1948, and, therefore, in the present case, the development which it is desired to carry out will be work "which is carried out after the appointed day." Sub-section (2) provides:

"In this Act, except where the context otherwise requires, the expression 'development' means the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land."

There is no doubt that the erection of the buildings by the plaintiff will be a "development" within the meaning of that provision.

[HIS LORDSHIP referred to s. 12 (5), s. 77 (1), and s. 78 (1) and continued:] Those provisions cannot apply to the present case, and the point of the reference to them is to show, as contended by counsel for the Central Land Board, that, where it is desired to preserve the effect of permissions previously given, the Act provides in appropriate terms that permission under the Act shall be deemed to have been given in those cases.

Section 101 (1) contains provisions under which the Minister may make regulations.

"(a) for the transfer to local planning authorities of property and liabilities of councils of county districts, being property and liabilities held or incurred for the purposes of the exercise, under the enactments relating to town and country planning in force before the appointed day, of functions corresponding with the functions of local planning authorities under this Act; (b) for the transfer to local planning authorities, or to the constituent authorities of joint planning committees, of property and liabilities of such committees . . ."

Then the transfer of officers and the continuation of proceedings are dealt with.

In pursuance of s. 101 the Minister has made the Town and Country Planning (Transfer of Property and Officers and Compensation to Officers) Regulations, 1948 (S.I., 1948, No. 1236). Regulation 3 of those regulations provides:

"Save as is mentioned in reg. 5 of these regulations, the property and liabilities of the council of a county district being property and liabilities held

or incurred for the purpose of old planning functions shall on the appointed day be transferred to and vest in the local planning authority for the area in which such district is situated."

Regulation 10 provides that:

"All contracts, deeds, agreements, notices and other instruments affecting any old planning functions or any property or liabilities transferred by virtue of these regulations and subsisting at the appointed day shall be of as full force and effect against or in favour of the local planning authority or authorities to whom the transfer was made and may be enforced as fully and effectually as if, instead of the council or joint planning committee named in the instrument, the authority or authorities to whom the transfer was made had been a party thereto."

That regulation does not seem to be authorised under the particular powers conferred in paragraphs (a) to (f) of s. 101 (1), but I think it is justified under the general authority in the sub-section to make regulations consequential on or supplementary to the provisions of s. 4, and the effect appears to be that I must treat the agreement of July 24, 1937, as though the Middlesex County Council were a party to it instead of the Ealing Borough Council.

The Act of 1932 has been repealed by virtue of s. 113 (2) of, and sched. IX to, the Act of 1947. In sched. X, which is entitled: "Transitory Provisions and Provisions Consequential on Repeals" I find the following provisions in para. 10:

"Subject as hereinafter provided, any agreement for restricting the planning, development or use of land made under s. 34 of the Act of 1932 with any such authority as is mentioned in sub-s. (2) of that section, or made or having effect as if made under a planning scheme with the responsible authority for the purposes of the scheme, shall, if in force on the appointed day, continue in force in accordance with the terms thereof and may be enforced under the said s. 34 or under the scheme, as the case may be."

It appears to me that the principal object of that transitional provision is to enable the restrictive provisions contained in an agreement made with a former planning authority to be enforced by the new and substituted planning authority against any landowner who has submitted to the imposition of restrictive covenants on his land. It would appear that s. 34 (1) of the Act of 1932, as construed by the Court of Appeal in *Ransom & Luck, Ltd. v. Surbiton Borough Council* (1), had a very limited effect and was really concerned with the making effective of an agreement for restrictive covenants, but there is, of course, the provision that, if it has effect under a planning scheme, it will be enforceable under the scheme. Therefore, there is to that extent a wider provision in para. 10 of sched. X to the Act of 1947 than simply the continuing in force of the terms of s. 34.

Consequently, it seems that the agreement in the present case remains in force and is enforceable by virtue of the provisions of this paragraph. There are certain provisos which also appear in the paragraph. Provisos (b) and (c) are concerned with the modification of any restrictive provisions for the development or use of the land either by the Minister or on the application of a party or by arbitration. Proviso (a) is certainly in wider terms. It provides that:

"nothing in any such agreement shall be construed as restricting the exercise, in relation to land to which any such agreement applies, of any powers exercisable by any Minister or authority under this Act so long as

(1) 113 J.P. 95; [1949] 1 All E.R. 185; [1949] Ch. 180

those powers are exercised in accordance with the provisions of the development plan or in accordance with any directions which may have been given by the Minister under s. 36 of this Act, or as requiring the exercise of any such powers otherwise than as aforesaid."

Counsel for the Central Land Board has said that that is simply a recognition of the principle which was stated by the Court of Appeal in *Ransom & Luck, Ltd. v. Surbiton Borough Council* (1). However that may be, this provision is, undoubtedly, wider than merely the consideration of restrictions on the use of land contained in an agreement by a landowner. Furthermore, I find that under the Interpretation Act, 1889, s. 38 (2):

"Where this Act or any Act passed after the commencement of this Act repeals any other enactment, then, unless the contrary intention appears, the repeal shall not . . . (c) affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment so repealed."

The Act of 1932 has been repealed by the Act of 1947, and it is said, with some force, that the right given by the consent of the Ealing Borough Council under the agreement of July 24, 1937, made under s. 34 (1) of the Act of 1932, is a right which has been acquired by the plaintiff under the provisions of the repealed enactment. Therefore, it is said that the repeal of the Act of 1932 ought not to affect the right which the plaintiff acquired by virtue of the consent. All that is true, but it seems to me that it is not sufficient for the plaintiff's purposes.

It would have been extremely simple for the legislature to have provided in the Town and Country Planning Act, 1947, that any consent or permission given by a planning authority under the Acts which previously existed should remain effective so that permission under the Act of 1947 should not be required. The legislature has not done that, and, furthermore, the legislature has provided in certain cases where permission has been given that permission should be deemed to have been given under the Act of 1947. That seems to me to be of importance, as indicating the manner in which I should approach the question which I have to decide. Although I must treat any right as given by the agreement of July 24, 1937, as not affected by the repeal of the Act under which it was given, and although I must treat the agreement as being an effective agreement, enforceable according to the provisions of para. 10 of sched. X to the Act of 1947, and, by virtue of s. 101 and the regulations made thereunder, as an agreement which was entered into by the Middlesex County Council, the present planning authority, yet all that does not make the consent contained in the agreement more than a consent which was given under the provisions of the Act of 1932 and does not amount to a permission of the necessary nature, i.e., a permission given under the Town and Country Planning Act, 1947. Accordingly, I am driven to the conclusion, however arbitrary the result may be, that in this case permission was required under the provisions of s. 12 of the Act of 1947 for the development desired by the plaintiff, there being no effective provision which excepts him from the express terms of s. 12. Such permission being necessary, it follows from s. 69 of the Act of 1947 that the development charge will be payable.

Order accordingly.

Solicitors: *Lamartine Yates & Lacey*, agents for *Francis & Davies*, Sudbury, Middlesex (for the plaintiff); *Treasury Solicitor* (for the defendants).

R.D.H.O.

COURT OF APPEAL

(SINGLETON, DENNING AND HODSON, L.JJ.)

May 7, 8, 1952

RICHARDS v. RICHARDS AND ANOTHER

Divorce—Desertion—Continuance of desertion—Adultery of petitioner—Effect on deserting spouse's mind.

The parties were married in May, 1947, when the husband was serving in the army and the wife was living with her parents and earning her own living. In December, 1947, the husband, having come out of the army, deserted the wife. In 1948 the wife committed adultery. In October, 1949, the wife informed the husband of her adultery and asked him to divorce her. Until then the husband had contemplated reconciliation. In December, 1950, the husband asked the wife for evidence of her adultery. The wife now petitioned for divorce on the ground of desertion, and the husband cross-petitioned on the ground of adultery. A decree was pronounced in favour of the wife on the ground that the husband's conduct conduced to her adultery, and, therefore, his desertion continued.

HELD: adultery by a deserted spouse terminated the desertion unless it was shown that the conduct of the deserting spouse was not affected by the adultery; the onus of proving that fact was on the spouse who committed adultery; in the present case, the wife's adultery had affected the husband's attitude towards her; and, therefore, the wife was not entitled to a decree.

Observation of LORD GREENE, M.R., in *Williams v. Williams* ([1943] 2 All E.R. 748), applied.

APPEAL by the husband from an order of Mr. Commissioner REWCASTLE, K.C., dated Jan. 21, 1952, whereby he granted a decree nisi of divorce to the wife on the ground of the husband's desertion and dismissed a cross-petition by the husband for divorce on the ground of the wife's adultery.

On May 31, 1947, the parties were married, while the husband, who was then serving in the army, was on leave, and they lived together for two days. In November, 1947, having heard that the wife was going about with other men, the husband obtained compassionate leave to visit her for a week-end. Although he accepted her explanation at the time, he did not return to her, and, in December, 1947, he wrote a letter to her showing that he then had an intention to leave her. When he was released from the army he saw her once or twice, but they did not live together. In 1949 the wife committed adultery, and, finding that she was pregnant, she informed the husband of the fact, through her solicitors, in October, 1949, and intimated that she would like the husband to begin divorce proceedings against her. He was unable to do so at that time, as three years had not passed since the date of the marriage. In December, 1950, he wrote to the wife's solicitors asking if the wife and the co-respondent would make statements to enable him to commence divorce proceedings, but, instead of supplying the statements, the wife presented a petition for divorce on the ground of the husband's desertion. The husband thereupon put in a cross-prayer for divorce on the ground of the wife's adultery.

The learned commissioner found that the husband had deserted the wife from December, 1947, and that the wife's adultery did not terminate the husband's desertion as the husband's conduct had conduced to the adultery.

Seuffert for the husband.

Kee for the wife.

SINGLETON, L.J.: I will ask DENNING, L.J., to give the first judgment.

DENNING, L.J., stated the facts, and continued: The law in such a

situation was stated by SIR BOYD MERRIMAN, P., in *Herod v. Herod* (1), in terms which have been repeatedly approved in this court. The wife's adultery does not automatically terminate the desertion. It is, however, a serious prejudice to any hope of reconciliation—so serious, indeed, that it will be held to be one of the causes why there was no reconciliation and, therefore, one of the causes of the subsequent desertion, unless she can show that the husband's conduct was not affected by it. If she can show that he did not know of it, or that he would never have come back to her again in any event, his desertion continues, but, if there is some chance of his coming back and her conduct destroys that chance, his desertion comes to an end when he gets to know of it because he then has good cause for staying away. It is very different if his conduct has conduced to her adultery because, as SIR BOYD MERRIMAN, P., said:

"I do not think that a spouse could be heard to say that adultery at which he or she had connived, or to which his or her conduct had conduced, was a reasonable excuse for desertion."

That passage was approved and applied in this court in *Callister v. Callister* (2).

In the present case, therefore, the first question is whether the husband's conduct conduced to the wife's adultery. Conduct only conduces to adultery when it is such conduct "as is proved to have brought about the adultery": see per SIR BOYD MERRIMAN, P., in *Herod v. Herod* (1). There must be conduct which is closely and directly connected with the adultery, such as exposing a wife to known and obvious dangers. Applying this test, I am clearly of opinion that desertion by itself is not conduct conducing to adultery. It would be a deplorable thing if desertion by one party were thought to be an excuse for the other party to commit adultery. It may explain the adultery, but it does not excuse it. During the war it often happened that, when the husband was serving abroad, his wife at home committed adultery, and in the pension cases it was always held that the wife's adultery was not caused by the separation, but was due to her own personality and conduct. So, it seems to me, in these cases, when there is desertion and nothing more, and then the wife commits adultery, her adultery is due, not to the desertion, but to her own weakness of character, or, as, no doubt, she would prefer to put it, because she fell in love with another man. That is the case here. A year after the desertion the wife fell in love with another man and committed adultery with him. The adultery is due to her own weakness of character and not to the desertion. In *Parry v. Parry* (3) there was a separation without any fault on the part of the husband. A jury found that his conduct conduced to the adultery, but GORELL BARNES, J., doubted whether he would have found that there was conduct conducing, and I think that his doubts were well founded. I should have thought there was no evidence in that case of conduct conducing to adultery.

Counsel for the wife contended that in the case now before us there was something more than desertion, but it is significant that in the pleadings it is not alleged that the husband's conduct had conduced to the adultery. That does not prevent the court from considering it, and it may have to do so, but, if the wife does not allege it, it goes to show that there is no substance in that suggestion. The wife was not left destitute. After her husband deserted her, she lived at home with her parents and went out to work to earn her living in the same way as she had done before the marriage. She said in evidence that she did not take proceedings before the justices against her husband for desertion because she

(1) [1938] 3 All E.R. 722; [1939] P. 11.

(2) (1947), 63 T.L.R. 503.

(3) [1896] P. 37.

did not want money. In those circumstances, it seems to me to be plain that his conduct did not conduce to her adultery. I, therefore, find myself unable to agree with the finding of the commissioner on that point.

Once it is found that the husband's conduct did not conduce to the wife's adultery, it follows that her adultery terminated his desertion unless she can show that it did not. The burden is on the wife to show that her adultery had no effect on the husband's conduct. In the words of LORD GREENE, M.R. in *Williams v. Williams* (1), it must be shown that her adultery did not affect the husband's attitude towards her "in the way of impeding a possible reconciliation in future." The commissioner found, in effect, that she had not discharged that burden of proof. He said that the adultery "may have had some effect on his state of mind". The husband gave evidence that it did. He said that, when he found that she was bearing the child of another man, there was no possibility of his going back. On that finding of fact by the commissioner (which is amply supported by the evidence), the wife has failed to prove that her adultery had nothing to do with his subsequent desertion. So the result of the case is this. There was desertion by the husband in December, 1947, the wife committed adultery in the middle of 1949, and, when the husband got to know of it, his desertion ended, because he then had good cause for staying away. She cannot, therefore, succeed on her petition for divorce on the ground of his desertion.

The remaining question is whether the husband should succeed on his cross-petition for divorce on the ground of the wife's adultery. The adultery is established, but, as he deserted her first, that is a ground on which this court has a discretion to refuse his petition: Matrimonial Causes Act, 1950, s. 4 (2), proviso (iii). We have been referred to several of the old cases, and among them to *Jeffreys v. Jeffreys & Smith* (2), decided in 1864. In those days the court refused to grant a decree of divorce to the husband in such circumstances, but discretion is now exercised very differently from what it was in 1864. The wife wants a divorce so that she can marry the other man whose child she has. In the interests of the child—and, indeed, of everyone, since the married life has come to an end—the right course is that the court, in the exercise of its discretion, should grant a divorce on the cross-petition of the husband. In my opinion, the appeal should be allowed, the wife's prayer should be rejected, and the husband's cross-prayer for divorce should be granted.

HODSON, L.J.: I agree.

SINGLETON, L.J.: I also agree.

Appeal allowed.

Solicitors: *Smiles & Co.* (for the husband); *Edward Fail & Co.* (for the wife).

F.G.

(1) [1943] 2 All E.R. 746.
(2) (1864), 3 Sw. & Tr. 493.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., JONES AND PARKER, JJ.)

May 9, 1952

CURTIN v. CURTIN

Justices—Maintenance order—Husband living in wife's house—Residence under same roof under estranged conditions for three months after order—Enforceability of order—Summary Jurisdiction (Separation and Maintenance) Act, 1925 (15 and 16 Geo. 5, c. 51), s. 1 (4).

On Jan. 31, 1951, on the complaint of a wife, justices made a maintenance order against her husband. Between that date and May 9, 1951, the parties lived under estranged conditions in a house owned by the wife. The wife did not take any step to evict her husband because she was erroneously of the opinion that, if she did so, she might be adjudged guilty of desertion. By May 9 the husband was in arrears to the extent of £26, and on that date the wife preferred a complaint before the justices, who made an order committing the husband to prison.

HELD: that as the husband had resided with the wife in the house for a period of more than three months from the making of the original order, she had resided with him within the meaning of s. 1 (4) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, with the result that on the termination of that period the original order ceased to be enforceable, and, accordingly, the order committing the husband to prison was invalid and must be quashed.

CASE STATED by Middlesex justices.

At a court of summary jurisdiction sitting at Wealdstone on Aug. 15, 1951, a complaint was preferred by the wife against the husband alleging that he had not complied with an order made on Jan. 31, 1951, on the ground of his wilful neglect to provide her with reasonable maintenance, that he should pay her maintenance at the rate of 40s. a week. Between Jan. 31, 1951, and May 9, 1951, the parties were living in the same house, but not as man and wife. The house was owned by the wife who had not asked the husband to leave or taken any step to evict him because she feared that, if she did so, she might be adjudged guilty of desertion. Otherwise, she would have asked him to leave, and, if he had refused, would have tried to force him to go. By May 9, 1951, the husband was in arrears with the payments under the order to the extent of £26 11s. For the husband it was contended that, as the parties were living under the same roof, under s. 1 (4) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, the order had ceased to have effect. The wife contended that the husband insisted on residing in her house so as to defeat the order, and that he was residing with her and not she with him. The justices being of the opinion that s. 1 (4) was limited in its operation to a wife who continued to reside with the husband and not to a husband who continued to reside with his wife, held that the order was enforceable and committed the husband to prison for three lunar months in default of payment of the arrears. The husband appealed.

Stranger-Jones for the husband.

Charles Lawson for the wife.

LORD GODDARD, C.J.: If we could see our way to uphold the order of the justices we would do so, because it is very desirable that a man should maintain his wife, more especially when the matrimonial home happens to be the wife's house in which the husband lives and does not pay anything. The difficulty in these cases is the wording of the Act. I am not going to repeat what has been said by the court in *Evans v. Evans* (1), *Thomas v. Thomas* (2) and

(1) 112 J.P. 23; [1947] 2 All E.R. 656; [1948] 1 K.B. 175.

(2) 112 J.P. 345; [1948] 2 All E.R. 98; [1948] 2 K.B. 294.

Wheatley v. Wheatley (1). The only difference between this case and *Evans v. Evans* (2) is that in *Evans v. Evans* (2) the house belonged to the husband and the wife insisted on living in it, whereas in this case the wife has allowed the husband to reside in her house. The wording of s. 1 (4) of the Act is that the order shall have no effect

"... whilst the married woman with respect to whom the order was made resides with her husband, and any such order shall cease to have effect if for a period of three months after it is made the married woman continues to reside with her husband."

So that, if she was residing with her husband at the time the order was made and continues to reside with him for three months thereafter, the order automatically comes to an end.

In the opinion of the court, that is what has happened in this case. The justices have sought to draw a distinction between a wife residing with her husband and a husband residing with his wife. I am afraid that is too subtle a distinction for me. If a husband resides with his wife, the wife resides with her husband, and vice versa. In the present case, no doubt, the parties are living at arms' length under the same roof, but they are living together under the same roof. As we pointed out in *Evans v. Evans* (2), and afterwards in *Wheatley v. Wheatley* (1), the words of the statute have to be given their ordinary meaning, and the court could not see how it could be said that the parties did not reside together when they were living in the same house together. In the present case the justices find that for a mistaken reason the wife has never asked her husband to leave the house. Under this Act, she could get an order while she was still living with him, and as soon as she got it she need only tell him to leave the house and bolt the door against him if he did not, or, perhaps, take proceedings in the county court. She never asked him to leave, as the justices have found, because she thought that, if she did, she would be guilty of desertion, but in such a case she would not be guilty of desertion without cause. As it is, at the present moment and ever since she got the order her husband has been living in her house by her leave and licence, and her reason for permitting him to do so is immaterial. If she withdrew the leave and licence and told him to go, and he did not do so, so that he became a trespasser, there would be very different considerations arising, and I think it might well be that in such a state of affairs the court would not regard the parties as living together because it would be very difficult to say that a householder was residing with a trespasser who was on the premises against the will of the householder, but in this case it is abundantly clear that the wife never has requested the husband to go and he is still there with her permission. In my opinion, therefore, she is still residing with him, the decisions in *Evans v. Evans* (2) and *Wheatley v. Wheatley* (1) apply, and the order has come to an end. The wife is not without remedy. She can either take proceedings in the Divorce Court or she can tell the husband to go. If he does not go, he will put himself at once in the wrong, and she can again go to the justices, and, I have no doubt, get another order. For these reasons I think a committal order cannot be made in this case because the order has come to an end.

JONES, J.: I agree.

PARKER, J.: I agree.

Appeal allowed.

Solicitors: *H. R. Hodder & Son* (for the husband); *E. P. Hanney* (for the wife).

T.R.F.B.

(1) 113 J.P. 459; [1949] 2 All E.R. 428 [1950] 1 K.B. 39.

(2) 112 J.P. 23; [1947] 2 All E.R. 656; [1948] 1 K.B. 175.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., JONES AND PARKER, J.J.)

May 9, 1952

BECKER v. CROSBY CORPORATION

Small Tenement—Recovery of possession—Notice to quit by local authority—Notice to be signed by "clerk or lawful deputy" of authority—Signature by housing manager—Housing Act, 1936 (26 Geo. 5 and 1 Edw. 8, c. 51), s. 164 (2).

A local authority, in exercise of their powers of management of houses provided by them under s. 83 (1) of the Housing Act, 1936, served a notice to quit on a tenant. The notice was signed by the housing manager of the authority. The tenant failed to deliver up possession and proceedings to recover possession under s. 1 of the Small Tenements Recovery Act, 1838, were taken by the local authority.

HELD: (i) that, in taking the proceedings, the local authority were exercising their powers under the Housing Act, 1936.

Shelley v. London County Council. Harcourt v. London County Council (1948) (113 J.P. 1) followed.

(ii) that the notice to quit was a "notice . . . proceeding from a local authority under this Act" within the meaning of s. 164 (2) of the Housing Act, 1936, and, accordingly, one which required to be signed by the clerk of the authority or his lawful deputy.

(iii) that, in the absence of evidence that the housing manager was the lawful deputy of the clerk, the notice was invalid.

CASE STATED by Lancashire justices.

On Sept. 28, 1951, at a court of summary jurisdiction, sitting at Liverpool, on an application by the housing manager of Crosby Corporation ("the respondents") under the Small Tenements Recovery Act, 1838, s. 1, the justices granted a warrant directing the constables to enter a tenement known as No. 66 Woodend Avenue, and deliver up possession thereof to the respondents. The premises had been let on July 23, 1951, by the respondents to the appellant Becker on a weekly tenancy, and, in exercise of their powers of management under s. 83 (1) of the Housing Act, 1936, they now required possession. On Aug. 17, 1951, a notice to quit signed by the respondents' housing manager to take effect on Aug. 27, 1951, was served on the appellant, but he failed to deliver up possession, and on Sept. 6, 1951, the respondents served on him a notice of their intention to apply for a warrant under s. 1 of the Act of 1838, as extended by s. 156 (2) of the Housing Act, 1936. For the appellant it was contended, *inter alia*, that the notice to quit was invalid because it was not signed by the respondents' clerk or his lawful deputy as required by s. 164 (2) of the Housing Act, 1936. For the respondents it was contended that that sub-section did not apply to a notice to quit. The justices, being of the opinion that the notice to quit was valid according to the general law and was not a notice within the meaning of s. 164 (2) of the Act of 1936, issued the warrant. The tenant appealed.

G. W. G. Jones for the tenant.

Squibb for the council.

LORD GODDARD, C.J.: The point which is taken in this case is that the notice to quit which was served on Aug. 17, 1951, to take effect on Aug. 27, 1951, was bad because it was signed by the housing manager of the corporation and not by the town clerk or by his lawful deputy. It is, therefore, necessary to

look at three sections of the Housing Act, 1936, and to bear in mind the interpretation put on them by the House of Lords in *Shelley v. London County Council*. *Harcourt v. London County Council* (1). By s. 83 (1) it is provided:

"The general management, regulation, and control of houses provided by a local authority under this Part of this Act shall be vested in and exercised by the authority . . ."

By s. 156 (2):

"Where a local authority, for the purpose of exercising their powers under any enactment relating to the housing of the working classes, require possession of any building or any part of a building of which they are the owners, then, whatever may be the value or rent of the building or part of a building, they may obtain possession thereof under the Small Tenements Recovery Act, 1838, as in the cases therein provided for, at any time after the tenancy of the occupier has expired, or has been determined."

That section gives to the local authority a very special right, because an ordinary landlord can only take proceedings under the Small Tenements Recovery Act, 1838, if the rent of the property does not exceed £20. By s. 164 (2) of the Housing Act, 1936, it is provided:

"A notice, demand, or other written document proceeding from a local authority under this Act shall be signed by their clerk or his lawful deputy."

In *Shelley v. London County Council* (1), the House of Lords decided that, in taking proceedings to recover possession of property to which the Housing Act, 1936, applies, the control and management of which is vested in the local authority, the local authority are exercising their powers under the Act. Therefore, it seems to me difficult to say that when they serve a notice to quit to get possession of such property they are not exercising their powers under the Act. The Small Tenements Recovery Act, 1838, indeed, expressly provides that it is only applicable where notice to quit has been served and expired. The corporation served a notice to quit, and took proceedings under the Act of 1838, showing thereby that they were exercising their powers under the Act. Therefore, in my opinion, it is impossible to say that the notice which they served was not a notice proceeding from a local authority under the Act of 1936. The housing manager swore that he had authority to give this notice. But that is not what is required. The Act requires that the notice shall be signed by the town clerk or his lawful deputy. There is no evidence that the housing manager was the lawful deputy of the town clerk, and, therefore, the point which has been taken on behalf of the appellant is good. The appeal must be allowed with costs.

JONES, J.: I agree.

PARKER, J.: I agree.

Appeal allowed.

Solicitors: *Fortescue, Adshead & Guest*, agents for *J. W. Wall & Co.*, Liverpool (for appellant); *Lees & Co.*, agents for *H. O. Roberts*, town clerk, Crosby (for the council).

T.R.F.B.

(1) 113 J.P. 1; [1948] 2 All E.R. 898; [1949] A.C. 56.

COURT OF CRIMINAL APPEAL

(LORD GODDARD, C.J., JONES AND PARKER, JJ.)

May 12, 1952

REG. v. WINDLE

Criminal Law—Defence of insanity—Lack of knowledge that act wrong—Meaning of "wrong"—Applicability of "M'Naghten Rules" to all forms of insanity.

Where a defence of insanity is raised and the contention on behalf of the defendant is that, owing to disease of the mind occasioning a defect of reason, he did not know that what he was doing was wrong, the defence must establish that at the material time he did not know that he was doing what was contrary to law, and it is not sufficient to prove that, though he knew he was doing what was contrary to law, he believed it to be morally right.

The rules in *M'Naghten's case* (1843) (10 Cl. & Fin. 200) apply to all forms of insanity and are not confined to insanity arising from delusions.

APPEAL against conviction.

The appellant was convicted at Birmingham Assizes before DEVLIN, J., of the murder of his wife and was sentenced to death. It was proved that he had administered to her a hundred aspirin tablets. The defence raised was that of insanity, but DEVLIN, J., ruled that there was no evidence of insanity to be left to the jury.

C. N. Shawcross, Q.C., and de Piro for the appellant.

Marshall, Q.C., and E. D. Lewis for the Crown.

LORD GODDARD, C.J., delivered the following judgment of the court. The appellant was convicted before DEVLIN, J., at Birmingham Assizes of the murder of his wife. He is a man of little resolution and weak character who was married to a woman eighteen years older than himself. His married life was very unhappy. His wife, in the opinion of the doctors, though they never saw her, must have been certifiable, and was always talking about committing suicide. The appellant became obsessed with this and discussed it with his workmates until they were tired of hearing him, and on one occasion, just before this crime was committed, one of them said: "Give her a dozen aspirins". On the day of the crime the appellant seems to have given the woman a hundred aspirin tablets, which was a fatal dose. Later, he told the police that he supposed he would be hanged for it.

The defence at the trial was that he was insane and that the jury should return a special verdict to that effect, but DEVLIN, J., ruled that there was no issue of insanity to be left to the jury. There was some evidence that the prisoner suffered from some defect of reason or disease of the mind. The doctor called for the defence said it was a form of communicated insanity known as *folie à deux* which arises when a person is in constant attendance on a person of unsound mind.

The point we have to decide can be put into a very small compass. We are asked to review—I am not sure we are not asked to make new law—what are known as the M'Naghten rules in which, in 1843, the judges agreed were the proper tests to be applied in considering the defence of insanity. All the judges, except MAULE, J., who differed on small points, gave, through the mouth of TINDAL, C.J., these answers to questions put by the House of Lords:

"That the jury ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that, to establish a defence on the ground of insanity, it must be clearly proved that,

at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong."

The argument in this appeal really has been concerned with what is meant by the word "wrong". The evidence that was given on the issue of insanity was that of the doctor called by the appellant and that of the prison doctor who was called by the prosecution. Both doctors expressed without hesitation the view that when the appellant was administering this poison to his wife he knew that he was doing an act which the law forbade. I need not put it higher than that. It may well be that in the misery in which he had been living with this nagging and tiresome wife who constantly expressed the desire to commit suicide, he thought she was better out of the world than in it. He may have thought it was a kindly act to put her out of her sufferings or imagined sufferings, but the law does not permit such an act as that. There was some exceedingly vague evidence that the appellant was suffering from a defect of his reason owing to this communicated insanity, and, if the only question in the case had been whether the appellant was suffering from a disease of the mind, that question must have been left to the jury because there was some evidence of it, but that was not the question. The question, as I endeavoured to point out in giving judgment in *Rex v. Rivett* (1), in all these cases is one of responsibility. A man may be suffering from a defect of reason, but, if he knows that what he is doing is wrong—and by "wrong" is meant contrary to law—he is responsible. Counsel for the appellant suggested that the word "wrong" as it is used in the M'Naghten rules did not mean contrary to law, but had some qualified meaning—morally wrong—and that, if a person was in a state of mind through a defect of reason that he thought that what he was doing, although he knew it was wrong in law, was really beneficial, or kind, or praiseworthy, that would excuse him.

Courts of law, however, can only distinguish between that which is in accordance with law and that which is contrary to law. There are many acts which, we all know, to use an expression to be found in some of the old cases, are contrary to the law of God and man. In the Decalogue are the commandments: "Thou shalt not kill" and "Thou shalt not steal". Such acts are contrary to the law of man and they are contrary to the law of God. In regard to the Seventh Commandment: "Thou shalt not commit adultery", it will be found that, so far as the criminal law is concerned, though that act is contrary to the law of God, it is not contrary to the law of man.

The test must be whether an act is contrary to law. In *Rex v. Rivett* (1) I referred to the Trial of Lunatics Act, 1883, s. 2 (1) of which provides:

"Where in any indictment or information any act or omission is charged against any person as an offence, and it is given in evidence on the trial of such person for that offence that he was insane, so as not to be responsible, according to law, for his actions at the time when the act was done or omission made, then, if it appears to the jury before whom such person is tried that he did the act or made the omission charged, but was insane as aforesaid at the time when he did or made the same, the jury shall return a special verdict . . ."

I emphasise again that the test is responsibility "according to law".

I am reminded by PARKER, J., that counsel for the appellant argued that the M'Naghten rules only applied to delusions. This court cannot agree with that. It is true that when the judges were summoned by their Lordships the occasion had special reference to M'Naghten's case (1), but the M'Naghten rules have ever since that date been generally applied to all cases of insanity, whatever the nature of the insanity or disease of the mind from which the offender is suffering.

In the opinion of the court, there is no doubt that the word "wrong" in the M'Naghten rules means contrary to law and does not have some vague meaning which may vary according to the opinion of different persons whether a particular act might or might not be justified. There seems to have been no doubt in this case that it could not be challenged that the appellant knew that what he was doing was contrary to law. In those circumstances what evidence was there that could be left to the jury to suggest that he was entitled to a verdict of Guilty but insane—i.e., insane at the time of the act complained of? DEVLIN, J., was right to withdraw the case from the jury. This appeal fails.

Appeal dismissed.

Solicitors: A. H. Evans, Birmingham (for the appellant); Director of Public Prosecutions (for the Crown).

(1) (1843), 10 Cl. & Fin. 200.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., JONES AND PARKER, JJ.)

May 15, 1952

SPRINGGATE v. QUESTIER

Street Traffic—Notice of intended prosecution—Notice sent to and received by company at registered address—Omission of word "limited"—Road Traffic Act, 1930 (20 & 21 Geo. 5, c. 43), s. 21 (c).

Notice of intended prosecution under s. 21 (c) of the Road Traffic Act, 1930, was sent by registered post to the registered address of Q. & Co., Ltd., a company which owned a motor vehicle that had been involved in an accident, and was received and accepted by the company there. The notice was addressed to "Q. & Co." instead of to "Q. & Co., Ltd."

HELD: that the omission of the word "limited" did not cause the notice to fail to comply with s. 21 (c), and that the notice was valid.

Clarke v. Mould (1945), (109 J.P. 175), distinguished.

CASE STATED by Surrey justices.

On Aug. 20, 1951, a motor car driven by the respondent, George John Henry Questier, was involved in a road accident. The registered owner of the car was Questier and Co., Ltd. On Aug. 29, 1951, under the Road Traffic Act, 1930, s. 21 (c), the police sent a notice of intended prosecution by registered post to "Questier and Co., 54, New Broad Street, E.C.2", and it was received and accepted by Questier and Co., Ltd., at the above-mentioned address, which was its registered office. On Oct. 17, 1951, a summons was served on the respondent at the same address. At a court of summary jurisdiction sitting at Guildford on Nov. 2, 1951, the respondent was charged on an information preferred by the appellant with driving a motor vehicle on a road in a manner dangerous to the public, contrary to the Road Traffic Act, 1930, s. 11 (1). It was contended on his behalf that s. 21 (c) of the Act had not been complied with

as the notice of intended prosecution was addressed to "Questier and Co.", and not to "Questier and Co., Ltd.", the registered owner of the vehicle. The justices, being of the opinion that s. 21 (c) had not been complied with, dismissed the information. The prosecutor appealed.

Southall for the appellant.

J. E. Williams for the respondent.

LORD GODDARD, C.J.: The only question is whether sufficient notice of prosecution was served on the registered owner of the motor vehicle which was involved in an accident while being driven by the respondent. The registered owner of the vehicle is Questier and Co., Ltd., and, as it is a company registered with limited liability, the word "Limited" forms part of its name: [Companies Act, 1948, s. 389]. The police addressed a notice of the intended prosecution to "Questier and Co., 54, New Broad Street, E.C.2", instead of to "Questier and Co., Ltd.", at the same address. As the word "limited" was omitted from the notice, it was contended on behalf of the respondent that s. 21 (c) of the Road Traffic Act, 1930, had not been complied with. In my opinion, it would be pedantic to the last degree to say that the notice of intended prosecution, required by s. 21 (c) of the Act of 1930, is bad because it does not use the word "limited" after the word "company". A point of that sort does not commend itself to any court, and it is not a point to which the court need give effect. *Clarke v. Mould* (1), which was cited to the justices, is the highest watermark ever likely to be reached. This case is distinguishable from it, and we send this case back to the justices with the intimation that the notice was sufficient.

JONES, J.: I agree.

PARKER, J.: I also agree.

Appeal allowed.

Solicitors: *Wontner & Sons* (for the appellant); *Johnson, Jecks & Landons*, agents for *Down, Scott & Down*, Dorking (for the respondent).

(1) 109 J.P. 175; [1945] 2 All E.R. 551.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., JONES AND PARKER, JJ.)

May 15, 1952

A. F. WARDHAUGH, LTD. v. MACE

Road Traffic—Carrier's "A" licence—Operation outside twenty-five miles limit—Jurisdiction of court—"Offence committed in respect of any property in or upon any vehicle employed in a journey"—Exemption for carriage of "meat"—Exclusion of fish—Summary Jurisdiction Act, 1879 (42 and 43 Vict., c. 49), s. 46 (3)—Transport Act, 1947 (10 and 11 Geo. 6, c. 49), s. 52 (1) (a), s. 125 (1).

Carriers who operated from Newcastle as their operating centre under an "A" licence, on Feb. 20 and 21, 1951, carried for hire or reward in an authorised vehicle a load of fish from Newcastle to Fleetwood, which was outside the twenty-five miles radius prescribed by their licence, without a permit from the Transport Commission under s. 52 (1) of the Transport Act, 1947. The vehicle was then driven empty to Liverpool, where on the following day it was loaded with fruit which it carried back to Newcastle. An information preferred at Liverpool magistrate's court charged the carriers with an offence under s. 52 (1) in respect of the carriage of fish from Newcastle to Fleetwood, and the magistrate convicted them.

HELD: that the magistrate had no jurisdiction to deal with any offence that might have been committed by the carriage of the fish from Newcastle to Fleetwood. Section 46 (3) of the Summary Jurisdiction Act, 1879, under which the magistrate purported to act, related only to offences, such as larceny or malicious damage, to property in or upon vehicles, whereas the present information related to the use of the vehicle and not to property in or upon it, and on this ground the conviction must be quashed.

Semle: "meat" as referred to in the exemption under s. 52 (1) (a) of the Transport Act, 1947, having regard to the definition contained in s. 125 (1), does not include fish.

CASE STATED by the Liverpool stipendiary magistrate.

At a court of summary jurisdiction, sitting at Liverpool, on Oct. 24, 1951, two informations were preferred by the respondent, a solicitor for the licensing authority for goods vehicles, under s. 52 of the Transport Act, 1947, against the appellants charging that on Feb. 21 and 22, 1951, at Liverpool, they failed to comply with the condition of a public carrier's (A) licence in that they carried goods for hire or reward in an authorised vehicle when the vehicle was more than twenty-five miles from its operating centre. The court found both charges proved and imposed fines of £10 and £5 respectively. The appellants carried on business as haulage contractors at Newcastle-upon-Tyne which was their operating centre, and they held a public carrier's (A) licence under which they were authorised to operate the vehicle. On Feb. 20 and 21, 1951, they carried a load of six and a half tons of fish on the vehicle from Newcastle-upon-Tyne to Fleetwood for hire and reward. The journey commenced at Newcastle at 10 p.m. on Feb. 20, the vehicle arrived at Fleetwood at 6.30 a.m. on Feb. 21, and the fish was unloaded. The vehicle was then driven empty to Liverpool where the driver took his statutory rest period. On Feb. 22 he went to a clearing house in Liverpool and undertook to carry a load of oranges from Liverpool to Newcastle for hire and reward. The vehicle was not used between its arrival at Liverpool until the driver went to the clearing house the next day to arrange its return load.

On the part of the appellants it was contended that (i) the condition imposed by s. 52 of the Transport Act, 1947, did not apply to the carrying of fish on the journey from Newcastle to Fleetwood because fish was "meat" within s. 52 (1) (a) and s. 125 of that Act; (ii) the court had no jurisdiction to hear the

information relating to Feb. 21 because at no time on that day did the vehicle carry goods for hire and reward within the city of Liverpool, and, alternatively, if the journey from Newcastle to Fleetwood, from Fleetwood to Liverpool, and from Liverpool to Newcastle were one journey, the court had no jurisdiction to deal with the information under s. 46 (3) of the Summary Jurisdiction Act, 1879, as no offence had been committed in respect of any property on the vehicle. It was submitted by the respondent that the contentions of the appellants were not sound. The stipendiary magistrate was of the opinion (i) that fish was not covered by the proviso in s. 52 (1) (a) of the Transport Act, 1947; (ii) that the driver was acting in the interest of his employer in obtaining a return load and came to Liverpool for that purpose; (iii) that the vehicle was engaged on a single journey and an offence had been committed in respect of property on the vehicle; and (iv) that on Feb. 21 and 22, in the city of Liverpool, the appellants had failed to comply with the conditions of their public carriers' licence; and, therefore, he had jurisdiction to deal with the information relating to Feb. 21. Accordingly, he convicted the appellants on each information.

F. A. Stockdale for the appellants.

J. P. Ashworth for the respondent.

LORD GODDARD, C.J.: This is a Case stated by the stipendiary magistrate for Liverpool before whom the appellants were charged with an offence against s. 52 of the Transport Act, 1947. That section allows a carrier under an A licence in respect of a vehicle owned by himself to carry goods for hire or reward only within a radius of twenty-five miles of the place where his vehicle is kept unless he has obtained a permit granted by the Transport Commission. The appellants, who are carriers carrying on business in Newcastle, had a permit which enabled them to go over a large part of the north of England, but did not allow them to go into Lancashire. On the day of the alleged offence they took a load of fish from Newcastle to Fleetwood and there discharged it. The driver then drove to Liverpool where he took what is called his statutory rest, and the next day he loaded the vehicle with oranges and returned to Newcastle. It is not disputed that in respect of that journey from Liverpool to Newcastle an offence was committed. The question is whether there was any offence committed in carrying the fish to Fleetwood, and, if there was, whether the stipendiary magistrate at Liverpool had any power to deal with it.

I am satisfied that this was what would be described in regard to a ship as a continuous voyage. The lorry went from Newcastle to Fleetwood, from Fleetwood to Liverpool, and from Liverpool back to Newcastle, so that it was a round voyage from Newcastle to Newcastle, but the offence alleged here is using the vehicle for that journey for the carriage of goods for hire or reward without a permit. If no goods are being carried for hire or reward, the owner of the vehicle is entitled to drive where he likes and as far as he likes. In carrying the fish to Fleetwood the appellants were carrying goods for hire or reward, and were guilty of an offence unless they came within one of the exceptions mentioned in s. 52.

The first point taken, and that on which this court is prepared to quash the conviction, is that the stipendiary magistrate at Liverpool had no jurisdiction to try the case. More than six months have gone by since the offence (if it was an offence) was committed, and so no other court has power to deal with it. Between Fleetwood and Liverpool no offence was committed because the lorry was not then carrying any goods. It is true that the driver, having unloaded his goods at Fleetwood, was going to pick up, and he did pick up, another load at Liverpool, but I am unable to see that in driving from Fleetwood to Liverpool

any offence was being committed. The stipendiary magistrate has purported to try the appellants for the offence which was committed by carrying goods from Newcastle to Fleetwood. Apparently he relied, as counsel for the respondent has relied, on s. 46 (3) of the Summary Jurisdiction Act, 1879, as giving him jurisdiction. The material words of s. 46 (3) are:

"Where the offence is committed on any person or in respect of any property in or upon any carriage . . . or vehicle whatsoever employed in a journey . . . the person accused of such offence may be tried by any court of summary jurisdiction through whose jurisdiction such . . . vehicle . . . passed in the course of the journey . . . during which the offence was committed."

This is not a charge in respect of property in or upon the vehicle. What is alleged is an offence against the Transport Act, 1947, s. 52 (1), which provides that it shall be a condition of every A licence that, except under and in accordance with a permit by the Transport Commission, goods shall not be carried for hire or reward in any authorised vehicle if the vehicle, at any time while the goods are being so carried, is more than twenty-five miles from its operating centre. It is obvious that s. 46 (3) of the Summary Jurisdiction Act, 1879, is meant to deal with what may be an assault on, or a robbery of, a person who is travelling in a railway train, in a stage coach, in an omnibus, or in a long-distance coach. If the offence is committed in the course of that journey, the person may be tried before any court having jurisdiction at any place through which the vehicle goes. So, too, if the offence is in respect of property, which, I think, contemplates the theft of or malicious damage to property, or some other offence with regard actually to the cargo or luggage on the vehicle. This is not one of those cases, and, therefore, in my opinion, it is abundantly clear that the stipendiary magistrate at Liverpool had no power to try this information.

The second point taken is more difficult. The merits of the case are said to be these. Section 52 (1) (a) of the Transport Act, 1947, provides that the condition with regard to the twenty-five miles' radius shall not apply in the case of a variety of goods and vehicles therein mentioned, such as tankers and other vehicles carrying liquid, furniture vans, and so forth. Then there is this provision:

" . . . or the goods carried are meat or livestock."

According to the definition of "meat" in s. 125 (1):

" 'meat' means carcases of animals, parts of carcases of animals, or offals of animals, being carcases, parts of carcases or offals suitable for human consumption, whether fresh, chilled or frozen, but not being carcases, parts of carcases or offals which have been cooked or subjected to any process other than skinning, trimming or cleaning."

The question is whether in the expression "meat" is included fish. In the days of Dr. Johnson it was common in the English language to talk about "meat" as meaning food. Certainly not in Stuart times, and probably not even in Dr. Johnson's time, would vegetables necessarily have been excluded. "Meat", I think, meant a meal. If a person was partaking of his "meat", it meant that he was partaking of the solid part of his food, and if he was also partaking (as he generally would be) of drink, that was the liquid part of his food. As is shown by the OXFORD DICTIONARY, that has now become an archaic use of the word "meat". I do not think that anybody would deny that, if people now refer to meat in the ordinary course of conversation or in writing, what is meant is butcher's meat. It may also include such things as hares, rabbits, and possibly poultry, and game. That matter may have to be decided some day. If there is

a doubt, it would be a very good thing if it could be cleared up, but one point that has given the court a certain amount of trouble is that, in addition to exempting vehicles carrying meat from the operation of s. 52, Parliament has exempted vehicles carrying livestock. "Livestock" generally means live animals. If the live and dead stock on a farm are advertised for sale, everybody knows what that means. The dead stock are the implements; the livestock are the animals on the farm, and I should think that in the great majority of cases at any rate it would include, and would be thought to include, the poultry on the farm. Although live poultry may be livestock, it does not necessarily follow that dead poultry are "meat".

For myself I prefer not to decide that question, but what I do decide is that in this statute passed in the year 1947 "meat" does not include fish. I think that, for the purpose of this Act, meat and fish must be regarded as two different things. I am fortified to some extent in the opinion that I have formed by two considerations. First, if it was meant to exclude fish from the operation of the section, it would have been extremely easy to say so. Vegetables are clearly not excluded because of the definition that "meat" means carcases of animals. Whatever a scientist may say, looking at the matter purely as one of science—that anything that breathes, moves, and has bones and glands, or whatever it may be, is an animal—I do not think that anyone nowadays talks about a fish lying on a fishmonger's slab as "a carcase of an animal". We need not deal with the difficult question what would be the position if the article were whale meat. A whale is a mammal, but we will leave out exceptions such as that until they arise. I think that when "meat" is defined to mean "carcases of animals, parts of carcases of animals, or offals of animals, being carcases, parts of carcases or offals suitable for human consumption", and the definition then goes on to deal with livestock, "meat" is what in the ordinary acceptance and common parlance would be called "meat". The section is certainly not intending to say that outside the statutory limit vehicles may be used to carry perishable goods (and fish would be perishable goods) because it expressly excludes meat which no one would suggest is highly perishable, namely, "whether fresh, chilled or frozen". Therefore, it is not what may be called an emergency provision. Whatever may be the reason for the omission to exclude fish from the operation of the Act, I am not prepared to hold that for the purpose of the Transport Act, 1947, s. 52, "meat" includes fish, but, for the reasons that I have given, on the other point the conviction must be quashed.

JONES, J.: I agree.

PARKER, J.: I agree.

Appeal allowed.

Solicitors: Doyle, Devonshire & Co., agents for T. H. Campbell Wardlaw, Newcastle-upon-Tyne (for the appellants); Treasury Solicitor (for the respondent).

T.R.F.B.

COURT OF APPEAL

(SOMERVELL, JENKINS AND MORRIS, L.JJ.)

May 1, 15, 1952

REG. v. ST. HELENS AND AREA RENT TRIBUNAL. *Ex parte* PICKAVANCE

Rent Control—Security of tenure—Power to extend period—Notice to quit given more than three months after decision of tribunal—Furnished Houses (Rent Control) Act, 1946 (9 and 10 Geo. 6, c. 34), s. 5—Landlord and Tenant (Rent Control) Act, 1949 (12 and 13 Geo. 6, c. 40), s. 11 (2) (b).

On Sept. 8, 1950, a tenant having referred his contract of tenancy of a furnished house to a rent tribunal under the Furnished Houses (Rent Control) Act, 1946, and the Landlord and Tenant (Rent Control) Act, 1949, the tribunal gave a decision approving the rent and giving no direction as to security of tenure. On Dec. 9, 1950 (i.e., three months and one day after the tribunal's decision) the landlord served on the tenant a notice to quit expiring on Dec. 18. On Dec. 9, on being served with the notice, the tenant applied to the tribunal under s. 11 (1) of the Act of 1949 for an extension of his period of tenure, and on Jan. 19, 1951, the tribunal made an order extending that period, and subsequently made further orders granting extension.

HELD (JENKINS, L.J., dissentiente): section 11 (2) (b) of the Act of 1949, being required by s. 11 (5) to be construed as one with the Act of 1946, operated only on notices to quit covered by s. 5 of the Act of 1946, i.e., those served "at any time before the decision of the tribunal is given or within three months thereafter," and, therefore, the notice to quit having been served more than three months after the tribunal's decision, the tribunal had no power to grant any extension of tenure under s. 11 (2) (b).

Decision of DIVISIONAL COURT (ante p. 147), affirmed.

APPEAL by the St. Helens and Area Rent Tribunal against an order of certiorari made by the Divisional Court (LORD GODDARD, C.J., JONES and PARKER, JJ.), dated Feb. 12, 1952 (reported ante p. 147), and directed to the tribunal to bring up and quash directions given by the tribunal on Sept. 7 and Oct. 16, 1951.

On Aug. 1, 1948, the applicant, Mrs. Ethel Pickavance, let to William John Leyland a furnished house known as No. 51, Rodney Street, St. Helens, on a weekly tenancy. On Aug. 1, 1950, the tenant referred the contract of tenancy to the tribunal under s. 2 (1) of the Furnished Houses (Rent Control) Act, 1946, and on Sept. 8, 1950, the tribunal approved the rent payable under the contract, but gave no directions as to security of tenure. On Dec. 9, 1950, the applicant served on the tenant a notice to quit expiring on Dec. 18, 1950. The tenant thereupon applied to the tribunal under s. 11 (1) of the Landlord and Tenant (Rent Control) Act, 1949, for an extension of the period at the end of which the notice to quit would take effect, and on Jan. 19, 1951, the tribunal, in purported exercise of their powers under s. 11 (2) (b), directed that the notice to quit should not have effect until the end of a period of three months from Dec. 18, 1950. Thereafter successive applications were made by the tenant and extensions were granted by the tribunal. Ultimately, by a direction dated Sept. 7, 1951, the tribunal extended the period of the notice to quit until Sept. 11, 1951, and on Oct. 16, 1951, pursuant to an application by the tenant on Sept. 9, they further extended it until Dec. 11, 1951.

For the tribunal it was contended that on the true construction of s. 11 of the Act of 1949 the tribunal had power to extend the period of security at any time after the reference and their jurisdiction was not confined to the extension of the period of a notice to quit given within three months of the reference. The applicant contended that s. 11 of the Act of 1949, read with s. 5 of the Act of

1946, should be construed as operating only on a notice to quit served within the limits of time specified in s. 5. The Divisional Court held that the jurisdiction of the tribunal to extend the period of the notice to quit under s. 11 only arose where the notice had been served between the date of the reference and the expiration of three months from the date of the tribunal's decision.

The Attorney-General (Sir Lionel Heald, Q.C.), and J. P. Ashworth for the tribunal.

Foz-Andrews, Q.C., and J. C. D. Harington for the applicant.

Cur. adv. vult.

May 15. The following judgments were read.

SOMERVELL, L.J.: This is an appeal from an order of the Divisional Court that certain directions given by the rent tribunal be quashed on an application for an order of certiorari. It turns on the construction of s. 11 of the Landlord and Tenant (Rent Control) Act, 1949. One has first to refer to the Furnished Houses (Rent Control) Act, 1946, with which that section has to be read and construed. I will set out what appears to me to be relevant in the latter Act.

The Act of 1946 provides under s. 1 (1) for the setting up of tribunals in areas to be specified by the Minister of Health. Section 2 provides that where there is a contract for the letting of furnished premises either the lessor, the lessee, or the local authority may refer the contract to the tribunal. The tribunal are given power (i) to approve the rent, (ii) to reduce the rent, (iii) to dismiss the application. If the rent is approved or reduced it is entered in a register. It is not so entered if the application is dismissed. In relation to a rent so entered in the register either lessor, lessee, or local authority may refer the matter to the tribunal for re-consideration of the rent on the ground of change of circumstances. On such a reference the tribunal have power to increase as well as approve or reduce the rent. The result of their decision will be entered in the register. The section with which we are in the main concerned is s. 5, which reads as follows:

"If, after a contract to which this Act applies has been referred to a tribunal by the lessee or by the local authority (either originally or for re-consideration), a notice to quit the premises to which the contract relates is served by the lessor on the lessee at any time before the decision of the tribunal is given or within three months thereafter, the notice shall not take effect before the expiration of the said three months: Provided that—(a) the tribunal may, if they think fit, direct that a shorter period shall be substituted for the said three months in the application of this section to the contract that is the subject of the reference; and (b) if the reference is withdrawn, the period during which the notice is not to take effect shall end on the expiration of seven days from the withdrawal of the reference."

The main scheme of this is clear. Unless the proviso is applicable the lessee is protected for a period starting with the reference and ending three months after the decision. But for some such provision in the case of a tenancy with a short period of notice the lessee could be dispossessed before the reference was considered. This might well have defeated quoad such tenancies the purpose of the Act. It would not have been worth applying. Similarly, immediately the decision was given the lessor could give under his contract, say, a week's notice. This also might have been a powerful factor in dissuading lessees from operating the Act.

Before turning to s. 11 of the Act of 1949 I will state the facts. The tenancy was a weekly one. On Aug. 1, 1950, the tenant referred the contract to the

tribunal. The tribunal made no reduction in rent and did not direct any shorter period than three months under s. 5, proviso (a). No notice to quit within the period as set out in s. 5 was served. After the three months had elapsed a notice to quit was served. There was admittedly no provision in the Act of 1946 to prevent that notice having its contractual effect. The lessee applied to the tribunal for an extension of her lease and successive orders have been made securing her in possession. The lessor, applicant in these proceedings, maintained, and the Divisional Court have held, that the tribunal had no jurisdiction to make these orders.

Section 11 of the Act of 1949 reads as follows:

"(1) Where a contract to which the Act of 1946 applies has been referred to a tribunal under that Act, and the reference has not been withdrawn, the lessee may, at any time when a notice to quit has been served and the period at the end of which the notice takes effect (whether by virtue of the contract, of the Act of 1946 or of this section) has not expired, apply to the tribunal for the extension of that period: Provided that an application shall not be made under this section where the tribunal have directed under para. (a) of the proviso to s. 5 of the Act of 1946, that a shorter period shall be substituted for the period of three months specified in that section as the period before the end of which a notice to quit shall not have effect. (2) On an application being made under this section—(a) the notice to quit to which the application relates shall not, unless the application is withdrawn, have effect before the determination of the application; (b) the tribunal, after making such inquiry as they think fit, and giving to each party an opportunity of being heard, or, at his option, of submitting representations in writing, may direct that the notice to quit shall not have effect until the end of such period, not exceeding three months from the date at which the notice to quit would have effect apart from the direction, as may be specified in the direction; (c) if the tribunal refuse a direction under this section, the notice to quit shall not have effect before the expiration of seven days from the determination of the application. (3) On coming to a determination on an application under this section the tribunal shall notify the parties of their determination. (4) Where on an application under this section the tribunal have refused a direction under sub-s. (2) thereof, no subsequent application under this section shall be made in relation to the same notice to quit. (5) This section shall be construed as one with the Act of 1946, and references in this section to that Act shall be construed as references to that Act as extended by s. 6 of this Act."

The Attorney-General, who argued the case for the rent tribunal, submitted that all the conditions had been fulfilled. The contract had been referred to the tribunal, the reference had not been withdrawn, a notice to quit had been served, the period at the end of which it took effect had not expired, and the tribunal had not shortened the three months' period.

It was submitted by counsel on behalf of the lessor that s. 11 of the Act of 1949 read with s. 5 of the Act of 1946 should be construed as operating only on notices to quit served within the limits of time specified in and covered by s. 5.

LORD GODDARD, C.J., referring to *Rex v. Folkestone & Area Rent Tribunal. Ex p. Sharkey* (1), in which the Divisional Court pointed out that the object of s. 11 (1) was to prevent retaliation by the landlord on his tenant because the tenant had referred the tenancy to a tribunal, said:

"We also decided that s. 11 (1) did not give a new power to the tribunal,

(1) 116 J.P. 1; [1951] 2 All E.R. 921; [1952] 1 K.B. 54.

but only extended the power given by s. 5 of the Act of 1946. Section 5 only applies where a notice to quit has been served after a reference and before a decision or within three months after it. Otherwise it does not give the tenant a right to apply for an extension of the tenancy. Therefore, before s. 11 (1) can take effect exactly the same circumstances must be shown to exist as are specified in s. 5, because the two sections have to be read together. As pointed out in the course of the argument by PARKER, J., the words were not intended, or, at any rate, are not apt, to give a tenant of a furnished house the protection given by the Rent Restrictions Acts to a tenant of an unfurnished house. They give him only this limited protection in certain circumstances dominated by the fact that they are designed to prevent retaliation by a landlord by serving a notice to quit in consequence of the tenant having referred the matter to the tribunal."

On the construction submitted by the Attorney-General the results are extensive and illogical. On his construction it does not matter at what distance of time the reference was made or what was its result, unless it was withdrawn or the tribunal shortened the period. Assume a reference which is dismissed either for want of prosecution or because it was regarded as unjustified. The lessor may be perfectly content with the lessee so long as the rent is paid and he does not ask for a shortening of the period as he has no immediate intention of serving a notice. Five years later he serves a notice and finds that the lessee is protected by s. 11. One asks oneself on what principle Parliament could have intended to protect lessees whose applications are dismissed or lessees who applied unnecessarily because the rent is approved, but to withhold the same protection from tenants who were sensible enough not to put themselves and their lessors to trouble and expense from which they derived no advantage. I would also find it difficult to understand why a lessee who fails when a reference is pressed to a decision is put, if there is no shortening, in a better position than a lessee on whom wisdom descends before the hearing and who decides to withdraw the reference. On the other hand, these are all conditions which one would expect to find if the section is operating, as the Divisional Court held, on notices to quit given within the period specified in s. 5. The words in brackets are all required on this more limited construction. The words "by virtue of the contract" are necessary because a notice to quit might be served within the three months to expire, by virtue of the contract, after the three months. That is a notice served within the limits of time covered by s. 5.

The Attorney-General submitted, I think with force, that on the Divisional Court's construction s. 11 (1) is likely to be of very little assistance. Lessors will now not serve notices to quit within the period specified. On the view that Parliament intended to give some power to extend the period of three months from a decision, they do not seem to have effectively achieved that purpose. I will turn to the words used. The opening words of s. 11 (1) themselves indicate to me that the section will be dealing with what has happened in the course of a reference. Section 5 extends that "course" by the period of three months after the decision. If it had been intended to make s. 11 operate if there had been a reference at any time, one would, I think, have found this made clear by the words "at any time" being inserted before the word "referred". The extravagant illogicalities which I have stated, I think, emphasise the need for these words. Sometimes, of course, the words "at any time" are unnecessary. The context implies them. I agree with PARKER, J., that the words "at any time" where they occur do not assist the Attorney-General's argument. The fact that they are where they are and not where they would be if his argument is right is,

if anything, against it. They are related to the lessee's application to the tribunal. When a notice to quit has been served and not expired he may "at any time" apply to the tribunal. That is how I read them, and I do not think they assist in deciding whether the section is dealing with what I will call s. 5 notices or all notices in future after there has been a reference. The distinction which the section draws between cases where the reference has been withdrawn and other cases also, I think, supports the Divisional Court's decision. The period of protection in the former case was fixed by s. 5 and it was not desired to interfere with it. But, as I have indicated, if the section was dealing with all notices in futuro, it would be illogical not to put in the same category references which were dismissed but where, possibly per incuriam, the tribunal had not shortened the period. It was pointed out that, if a notice has been served within the s. 5 period, the tribunal has power to extend indefinitely if successive applications were made. This is true, but their approach to the problem would or should be that they were being asked to extend a protection which Parliament had, *prima facie*, thought should end after three months. On the Attorney-General's argument they are given no guidance of any kind as to how they are to approach or deal with applications in respect of notices when the s. 5 period has elapsed. It gives a discretionary protection analogous to that given by the Rent Acts without any conditions, or limitations, or guidance. For these reasons, I think, the decision of the Divisional Court was right.

I should, perhaps, add that the Attorney-General stated that the Crown had, of course, no interest as between lessor and lessee, but desired a decision of this court on the construction of the section. Appearing for the rent tribunal, he put, if I may say so, every argument for the view which they had taken of their powers very cogently before us. I would dismiss the appeal.

JENKINS, L.J.: This is an appeal by the St. Helens and Area Rent Tribunal constituted under the Furnished Houses (Rent Control) Act, 1946, from an order of certiorari made by the Queen's Bench Division on Feb. 12, 1952, to bring up and quash certain directions given by the tribunal as being directions which they had no jurisdiction to give. The case concerns the weekly furnished letting by a Mrs. Ethel Pickavance to a Mr. William John Leyland of a dwelling-house known as No. 51 Rodney Street, St. Helens, under a contract of tenancy entered into on or about Aug. 1, 1948, and it is not in dispute that this contract of tenancy is a contract to which the Act of 1946 applies. On Aug. 1, 1950, Mr. Leyland referred the contract to the tribunal under the provisions of s. 2 (1) of the Act of 1946. The tribunal dealt with this reference on Sept. 8, 1950, when they approved the rent payable under the contract, but gave no other directions, and, in particular, did not direct under proviso (a) to s. 5 of the Act of 1946 that any shorter period should be substituted for the period of three months mentioned in that section as the period before the end of which a notice to quit should not have effect. The position, so far as the Act of 1946 was concerned, therefore, was that in the event of Mrs. Pickavance serving a notice to quit on Mr. Leyland within three months after Sept. 8, 1950 (the date of the tribunal's decision) such notice could only take effect on the expiration of such period of three months or on the expiration of the contractual period of notice whichever was the later. On Dec. 9, 1950 (i.e., one day after the expiration of the aforesaid period of three months) Mrs. Pickavance served on Mr. Leyland a notice to quit expiring on Dec. 18, 1950, and thus allowing for the full week's notice appropriate to the contract of tenancy.

If the matter had rested merely on s. 5 of the Act of 1946, Mr. Leyland would plainly have had no answer to a claim for immediate possession on the expiration

of this notice. But on Dec. 9, 1950 (that is to say, immediately after the service of the notice to quit) Mr. Leyland applied to the tribunal in reliance on s. 11 (1) of the Landlord and Tenant (Rent Control) Act, 1949, for an extension of the period at the end of which the notice to quit of that date would by virtue of the contract take effect (i.e., the period until Dec. 18, 1950, when possession would have to be given up according to the terms of the notice), and on Jan. 19, 1951, the tribunal, in exercise or purported exercise of their powers under sub-s. (2) (b) of that section, directed that the notice to quit should not have effect until a specified later date, being the end of a period not exceeding three months from the date (i.e., Dec. 18, 1950) at which the notice to quit would have had effect apart from the direction. Thereafter, similar successive applications (in each case before the expiration of the extension last previously granted) were from time to time made by Mr. Leyland and granted by the tribunal, and ultimately, by a direction dated Sept. 7, 1951, the tribunal extended the period of the notice to quit until Sept. 11, 1951, and by a direction dated Oct. 16, 1951 (pursuant to an application made by Mr. Leyland on Sept. 9, 1951) the tribunal directed

"that the notice to quit should not take effect until Dec. 11, 1951, being the end of a period not exceeding three months from the date at which the notice to quit would have had effect apart from this direction."

The order of certiorari under appeal relates to these two last-mentioned directions.

The contention which prevailed before the Divisional Court was to the effect that, on the true construction of s. 11 of the Act of 1949, read in conjunction with s. 5 of the Act of 1946, the jurisdiction of the tribunal to extend the period of a notice to quit under s. 11 only arises where a notice to quit has been served between the date of the reference and the expiration of a period of three months from the date of the tribunal's decision. If this contention is well founded, then, of course, it follows that the directions here called in question were made without jurisdiction, inasmuch as the notice to quit was not served until after (albeit only one day after) the expiration of the aforesaid period of three months. On the other hand, if on its true construction s. 11 enables the tribunal to direct the extension of the period of a notice to quit given at any time after the reference to the tribunal, provided only that the application for extension is made before the expiration of the period at the end of which the notice to quit would otherwise take effect, then it was within the jurisdiction of the tribunal to give the two directions with which the present appeal is concerned, and the order of the Divisional Court cannot stand.

In order to appreciate the effect of s. 5 of the Act of 1946 and s. 11 of the Act of 1949 (on the construction of which two sections (and, primarily, of the latter) the case ultimately depends) it is necessary to refer briefly to some of the other provisions of the earlier enactment. Section 1 of the Act of 1946 provides for the application of the Act by order of the Minister of Health to districts consisting of the whole or parts of the respective areas of local authorities and the constitution of a tribunal for each district in which the Act is in force. Section 2, by sub-s. (1), enables "contracts to which this Act applies", which may be compendiously described as "contracts for furnished letting", to be referred by the lessor or the lessee or the local authority to the tribunal for the relevant district. Sub-ss. (2) and (3) of s. 2 are in these terms:

"(2) Where any contract to which this Act applies is referred to a tribunal, then, unless at any time before the tribunal have entered upon consideration of the reference it is withdrawn by the person or authority by whom it was made, the tribunal shall consider it and, after making such inquiry as they

think fit, and giving to each party (and, if the house is one the general management whereof is vested in and exercisable by a housing authority, to that authority) an opportunity of being heard, or, in his option, of submitting representations in writing, shall approve the rent payable under the contract or reduce it to such sum as they may, in all the circumstances, think reasonable, or may, if they think fit in all the circumstances, dismiss the reference, and shall notify the parties and the local authority of their decision in each case. (3) Where the rent payable for any premises has been entered in the register in accordance with the provisions hereinafter contained, it shall be lawful for the lessor or the lessee or the local authority to refer the case to the tribunal for re-consideration of the rent so entered on the ground of change of circumstances, and the provisions of sub-s. (2) of this section shall apply on any such reference in like manner as they apply on a reference under sub-s. (1) of this section subject to the modification that the tribunal shall have power to increase the rent payable."

Section 3 provides for the keeping by the local authority of a register which is to contain prescribed particulars of any contract under which a rent is payable which has been approved, reduced or increased under s. 2, and s. 4 (1) makes it unlawful to require or receive rent in excess of the registered rent in respect of any premises.

Then comes s. 5 itself [HIS LORDSHIP read the section and continued:] I do not think there are any other provisions of the Act of 1946 to which reference is necessary for the present purpose.

Pausing there, I would observe that in the present case, by virtue of s. 5 and in view of the absence of any direction by the tribunal to the contrary, Mr. Leyland, having referred the contract to the tribunal and having maintained the reference to a decision as distinct from withdrawing it before the tribunal had entered on its consideration, became entitled to remain in undisturbed possession of the premises for a minimum period of three months from the date of the decision, notwithstanding any notice to quit given in conformity with the terms of the contract and purporting to take effect before the expiration of that period. Any notice to quit so given and purporting to take effect before such expiration would operate as a notice to quit taking effect on such expiration, while any notice to quit given in accordance with the terms of the contract so as to take effect on or after the expiration of the aforesaid period of three months would (so far as s. 5 was concerned) take effect according to its terms, even though given (as a notice to take effect on such expiration would obviously have to be given) during such period of three months.

Finally, there is s. 11 of the Act of 1949. The section having been just read in full by my Lord I will not take up time by reading it again. Now this section seems to me to provide in reasonably clear terms (by sub-s. (1)) that where the following three conditions are satisfied, that is to say, where (a) a contract to which the Act of 1946 applies has been referred to a tribunal, and (b) the reference has not been withdrawn, and (c) the tribunal has not directed under s. 5 of the Act of 1946 that a shorter period shall be substituted for the period of three months therein specified as the period before the end of which a notice to quit shall not have effect, then at any time when a notice to quit has been served, but the period at the end of which the notice is to take effect has not expired, either (i) "by virtue of the contract" (that is, because, although the period of three months mentioned in s. 5 of the Act of 1946 has expired, the period of notice appropriate to the particular contract has not), or (ii) "by virtue of the Act of 1946" (that is, because the period of three months mentioned in s. 5 of the Act

of 1946 has not expired and the notice, though purporting in accordance with the terms of the contract to take effect before the end of that period, is prevented from taking effect until the end of that period by the provisions of s. 5, or (iii) by virtue of s. 11 itself (that is, because in a case falling within (i) or (ii) above the period at the end of which the notice would otherwise have taken effect has already been extended by the tribunal under the provisions of s. 11 pursuant to some previous application or applications under that section and such extended period has not yet expired), the lessee may apply to the tribunal for an extension of the period at the end of which the notice would otherwise take effect, and (by sub-s. (2) (b)) that on such an application being made the tribunal may extend the period at the end of which the notice to quit would otherwise take effect by such period not exceeding three months as may be specified.

The periods which the tribunal is empowered to extend are thus, in case (i) above, the contractual period of notice, in case (ii) above, the statutory period of notice imposed by s. 5 of the Act of 1946, and, in case (iii) above, the statutory period of notice superadded by the previous operation of s. 11 either to the contractual period of notice or to the statutory period of notice imposed by s. 5. The lessee is in terms empowered to make his application at any time after a notice to quit has been served and before the period at the end of which it would otherwise take effect has expired, whether that period is simply the contractual period unaffected by s. 5, or the statutory period imposed by s. 5, or the statutory period superadded under s. 11 either to the contractual period or to the s. 5 period.

I appreciate that where the relief sought by an application under s. 11 (1) is an extension of the statutory period of notice imposed by s. 5, then, *ex hypothesi*, the notice to quit must have been served (and must according to the terms of the contract have purported to expire) and the application for such extension (or the first of such applications if more than one) must have been made within the period of three months mentioned in s. 5. But I see no warrant in s. 11, or in s. 11 read in conjunction with s. 5, either as a matter of express provision or as a matter of necessary implication, for holding that where the period sought to be extended is simply the contractual period of notice unaffected by s. 5, the tribunal only has power to direct an extension if the notice to quit was served before the expiration of the period of three months mentioned in s. 5. That section, as pointed out above, has nothing to say to a notice to quit expiring, according to the terms of the contract, with or after the expiration of the three months' period, whether such notice is served before or after the expiration of that period. What is material for the purpose of bringing into operation in any particular case the statutory period of protection afforded by s. 5 is, not the date at which the notice to quit is served (provided, of course, it is served after the contract has been referred), but the date at which it would, according to the terms of the contract and apart from the provisions of the section, take effect. If the latter date is before the end of the three months' period, then s. 5 gives security of tenure until the end of the three months. If it is after the end of the three months' period, then s. 5 does not operate, and, so far as the provisions of that section are concerned, the notice simply takes effect in accordance with the contract.

Accordingly, I find it impossible to escape the conclusion that where the extension of a purely contractual period of notice is in question, the jurisdiction of the tribunal is not limited to cases in which the notice to quit has been served before the expiration of the period of three months mentioned in s. 5, but extends to all cases in which, according to the terms of the contract, the notice to quit

would take effect at or after the end of that period, whether the notice was served before or after that date. There is, so far as I can see, nothing whatever in the language of s. 11 to impose any such limitation and nothing in the provisions of s. 5, read in conjunction with s. 11, to require or justify the implication of any such limitation on what appear to me to be the plain terms of s. 11. Moreover, a limitation of this character on the jurisdiction of the tribunal would produce strange anomalies. For instance, if the lessor under a furnished weekly letting gave one week's notice to quit by notice served the day before the expiration of the three months' period mentioned in s. 5, the tribunal would have jurisdiction, on the application of the lessee at any time before the expiration of the contractual period of one week from the service of the notice to grant up to three months' extension of the contractual period, and moreover to grant on the application of the lessee before the expiration of that extension yet another extension of the period at the end of which the notice would otherwise take effect, and so on ad infinitum. If, on the other hand, the lessor under a like letting gave one week's notice to quit by notice served the day after the expiration of the three months' period mentioned in s. 5, the tribunal would have no jurisdiction to grant any extension of the contractual period of notice and at the end of it the lessee would have to go. I cannot attribute to the legislature an intention to produce a result so capricious, and in the absence of clear words constraining me to do so I decline to construe s. 11 as producing it. Furthermore, s. 11 is clearly designed to give some additional protection to lessees, but if the jurisdiction of the tribunal under it were limited in the way above mentioned the additional protection which it purports to afford would for all practical purposes be illusory, for a lessor could always evade its provisions by the simple expedient of refraining from serving notice to quit until after the expiration of the three months' period mentioned in s. 5.

The Divisional Court, which took a different view, appears to have based its decision on two grounds, the first being that s. 5 was designed to prevent retaliation by lessors against lessees who referred their contracts to a tribunal by ejecting such lessees within a short time of the tribunal's decision, and the second being that s. 11 of the Act of 1949, which section has to be construed as one with the Act of 1946 (see sub-s. (5)) did not confer a new security of tenure, but merely extended the security of tenure afforded by s. 5 of the Act of 1946.

As to the first ground, I do not think that the imputation to s. 5 of the object of preventing retaliation by lessors, which is merely a picturesque way of saying that its object is to prevent lessors from deterring applications to the tribunal by their lessees and defeating the tribunal's decisions on such applications when made by ejecting their lessees before the expiration of three months from the dates of such decisions, materially advances the solution of the question of construction arising on s. 11. The object of s. 5 surely was not to punish lessors, but to give some measure of protection, in point of security of tenure, to lessees whose contracts of tenancy have been referred to a tribunal. The object of s. 11 palpably was to give such lessees some additional security of tenure over and above what they had under s. 5, and the question is what on the true construction of s. 11 that additional protection amounts to.

As to the second ground, I confess I find myself unable to follow it. Section 11, as I have said, purports to give lessees some additional protection in the way of security of tenure over and above what is given them by s. 5. The nature and extent of the additional protection so given must depend on the true construction of s. 11 read, no doubt, in conjunction with s. 5. If, on the true construction of s. 11, so read, the effect of s. 11 is merely to extend the security of tenure afforded

by s. 5 in cases in which that security of tenure has in fact become operative, then s. 11 must be accorded that limited effect. But there can be no warrant for thus limiting its construction by reference to a preconceived idea that it should be so limited. As pointed out above, the only case in which the statutory security of tenure afforded by s. 5 in fact becomes operative is the case in which notice to quit is served, and according to the terms of the contract would take effect, before the expiration of the period of three months mentioned in s. 5. Clearly the jurisdiction of the tribunal under s. 11 cannot as a matter of construction be limited to that case, for then the words "by virtue of the contract" in s. 11 (1) would be wholly inappropriate inasmuch as the only periods to which it had reference would be periods at the end of which notices to quit took effect by virtue of s. 5 of the Act of 1946 or of s. 11 itself. The jurisdiction under s. 11 being in terms applicable to periods at the end of which notices to quit take effect "by virtue of the contract", it seems to me that the theory that such jurisdiction is limited to extending the statutory security of tenure afforded by s. 5 in cases in which such security of tenure has in fact become operative falls to the ground, and I can see no justification, whether by reference to that theory or otherwise, for holding that s. 11 gives jurisdiction to extend a purely contractual period of notice if the notice to quit is served before the expiration of the period of three months mentioned in s. 5, but not if the notice to quit is served after such expiration. This seems to me a purely arbitrary distinction unsupported by anything in the terms of s. 11.

A point was sought to be made for the lessor of the alleged unreasonableness of giving the lessee something in the nature of a perpetual right of renewal merely because his contract had been referred to the tribunal and the reference had not been withdrawn. But this unreasonableness, if such it be, would not be mended by according the right to some lessees and not to others on the arbitrary and anomalous basis to which I have already referred. Moreover, it must be remembered that in wholly unmeritorious cases a safeguard is provided in the shape of the tribunal's power under s. 5 to abridge the three months' period and thus exclude the application of s. 11 by virtue of the proviso to sub-s. (1) of that section, and, further, that each application for an extension under s. 11 has to be adjudicated on by the tribunal, who, it must be assumed, will grant or refuse each application on its merits in a reasonable and proper exercise of their discretion.

It was also argued that s. 11, if construed so as to give the tribunal jurisdiction in such a case as the present, would involve the introduction by what purports to be merely an amending section of a radical alteration in the scope and purpose of the Act of 1946 as originally enacted. The Act of 1946, it is said, was concerned with security of tenure simply as an aid to the effective operation of the control by the statutory tribunals of the rents of furnished dwellings, whereas s. 11 of the Act of 1949, if given the construction contended for on the part of the tribunal in the present case, would make security of tenure per se a substantive and independent object of the legislation. This revolutionary result, it is claimed, should only be accorded to s. 11 if its language clearly and necessarily demands that conclusion. I would answer this argument by saying, first, that, in my view, the language of s. 11 does on examination clearly and necessarily demand the construction contended for on the part of the tribunal, and, secondly, that on either construction the allegedly revolutionary result is produced, the only difference being that its operation is on the one view uniform and on the other view capricious. I would add that legislation for the control of rents is notoriously ineffective in the absence of some degree of security of tenure, and

that the degree of security of tenure which it is necessary or desirable to provide in such legislation is essentially a matter for Parliament. I see nothing in s. 11, when construed in the way contended for on the part of the tribunal, which can be properly described as alien to or inconsistent with the general scope and purpose of the Act of 1946.

I recognise that the words: "Where a contract . . . has been referred . . . and the reference has not been withdrawn" at the beginning of s. 11 (1) do at first sight suggest a limitation of the application of s. 11 to cases in which the reference can be said to be in some sense pending. But reference to the opening words of s. 5—"If, after a contract . . . has been referred . . ." and the special provision made for the case of a withdrawn reference in proviso (b) to the same section, makes it, I think, reasonably plain that the opening words of s. 11 do include every case in which a contract has at any time been referred to the tribunal and such reference is either pending or has been dealt with in any manner by the tribunal, provided only that it has not been withdrawn and thus removed from the tribunal's consideration. I appreciate that this produces a somewhat curious result in that it, apparently, would enable a lessee to claim the benefit of s. 11 even where his application has been dismissed by the tribunal. But s. 5 itself would seem to be open to a similar criticism, and, perhaps (as suggested above in reference to the general argument of unreasonableness), the answer to it is that, if an application were dismissed as being wholly unmeritorious, the tribunal would be likely to give a direction under proviso (a) to s. 5 substituting a shorter, and it may be merely nominal, period for the period of three months mentioned in that section, thus depriving the lessee pro tanto of the protection of s. 5 and excluding him altogether from the benefit of s. 11. In any case I cannot regard this point as justifying the departure from the express terms of s. 11 which, in my view, is involved in the construction placed on it by the Divisional Court, which construction moreover does not, any more than the construction contended for on the part of the tribunal, disqualify a lessee's application on the ground that his reference has been dismissed.

Another curious feature of s. 11 is that it is not in terms confined, as s. 5 is confined, to notices to quit served by the lessor on the lessee. It may well be that it should by implication be so confined, particularly as the two sections are to be read together. But, whether this is so or not, I cannot regard the omission from s. 11 of words expressly limiting it to lessors' notices to quit as affording any support to the construction placed on s. 11 by the Divisional Court. Nor do I think the circumstance (adverted to by LORD GODDARD, C.J. ([1952] 1 All E.R. 457), in the course of his judgment) that the legislation does not extend to lettings for a fixed term as opposed to "periodic" lettings has any bearing on the question raised in this case. The legislature may well have considered that the great majority of cases calling for protection arose under lettings of the "periodic" type, and that the additional complication and difficulty of bringing in fixed-term lettings (which would obviously have called for a quite different method of treatment) would be out of proportion to the practical utility of doing so.

The decision of the Divisional Court in the present case was to some extent founded on the judgments of the Divisional Court in *Rex v. Folkestone & Area Rent Tribunal. Ex p. Sharkey* (1). The question in that case was whether s. 11 applied to a notice to quit which had been served by a lessor on a lessee before the contract had been referred to the tribunal, and the Divisional Court held

(1) 116 J.P. 1; [1951] 2 All E.R. 921; [1952] 1 K.B. 54.

that it did not. I think the actual decision was clearly right, as the language of s. 11 seems plainly to require that the contract should have been referred before service of the notice to quit with respect to which an extension is sought by the lessee. But in so far as the reasoning on which the decision was based turned on construing s. 11 in the sense in which that section has now been construed by the Divisional Court in the present case (which was, as it seems to me, unnecessary for the purpose of the decision) I find myself unable to agree with it. For these reasons, I would allow this appeal.

MORRIS, L.J.: Among the diverse purposes of the Landlord and Tenant (Rent Control) Act, 1949, as recorded in its heading, was that of amending the Furnished Houses (Rent Control) Act, 1946, as respects security of tenure. The Act of 1946 does not employ the phrase "security of tenure", but it is clear that a reference to the provisions of s. 5 of that Act is denoted. It seems further to be clear that it is by the provisions of s. 11 of the Act of 1949 that the amendment is achieved. The heading of the Act of 1949 does not delimit or define the extent of amendment that is to be enacted. It does not, therefore, provide any pointer which can give guidance in the solution of the problems of construction raised in this appeal. It is to the words and provisions of s. 11 of the Act of 1949 that attention must be directed in order to decide what amendment has been made as respects security of tenure. The inquiry becomes one as to the extent to which there has been modification of the security of tenure given to a lessee by s. 5 of the Act of 1946. In the case of a contract to which the Act of 1946 applied a lessee only had the measure of security given by s. 5 if (a) the contract had been referred to a tribunal by the lessee or by the local authority, and (b) after such a reference the lessor served a notice to quit on the lessee either before the decision of the tribunal was given or within three months thereafter. The Act of 1949 might amend the provisions of s. 5 fundamentally by enacting that in quite different situations than those covered by (a) and (b) above a measure of security should be given, or there might be amendment of the measure of security given, or there might be a combination of these. The contents of s. 11 of the Act of 1949 must furnish the answer to the inquiry raised.

It is enacted that s. 11 is to be construed as one with the Act of 1946. In *International Bridge Co. v. Canada Southern Ry. Co.* *Canada Southern Ry. Co. v. International Bridge Co.* (1), the EARL OF SELBORNE, L.C., referring to two Canadian Acts, said:

"It is to be observed that those two Acts are to be read together by the express provision of the seventh and concluding section of the amending Act; and therefore we must construe every part of each of them as if it had been contained in one Act, unless there is some manifest discrepancy, making it necessary to hold that the later Act has to some extent modified something found in the earlier Act."

In the present case it is, in my judgment, appropriate to read s. 5 of the Act of 1946 (which I will refer to as "s. 5"), and then, in relation to that section, to read s. 11 of the Act of 1949 (which I will refer to as "s. 11") and to decide what is the outcome.

If the words of s. 11 (1) are considered in isolation, they are wide enough to cover cases where contracts have been referred to a tribunal by the lessor, or by the lessee, or by the local authority. Section 5 refers to a reference by the lessee or by the local authority only. The words of s. 11 (1) are wide enough to cover a notice to quit served at any time after there has been a reference which

(1) (1883), 8 App. Cas. 723.

has not been withdrawn. Section 5 refers to a notice to quit served before the decision of the tribunal is given or within three months thereafter. The words of s. 11 (1) are wide enough to cover a notice to quit served either by the lessor or by the lessee. Section 5 refers to a notice to quit served by the lessor or the lessee. If, therefore, the words of s. 11 (1) are taken by themselves a very wide jurisdiction would be bestowed. If a contract was referred to a tribunal by a lessor and if no change in the rent payable was ordered and if some years later a notice to quit was served, then, on an application by the lessee, the tribunal would have power, within sub-s. (2), to postpone the date at which the notice to quit would have effect. This is by no means an impossible result even though it might be regarded as a surprising one. The inquiry remains as to what Parliament has enacted. It can with force be submitted that, if a tribunal is being endowed with wide powers to delay the operation in certain events of notices to quit, some statutory conditions would be prescribed to control, or, at least, to guide, the exercise of the jurisdiction. But the absence of any such directions would be of no relevance if by enactment the jurisdiction has been clearly given.

The requirement that s. 11 must be construed as one with the Act of 1946 makes it inappropriate to consider the words of s. 11 (1) in isolation. The phrase "... at any time when a notice to quit has been served and the period at the end of which the notice takes effect ... has not expired" refers, in my judgment, to the period between the serving of a notice to quit and its time of taking effect. But the words "a notice to quit" are not explained. It is not specified by whom the notice is to be given nor is there any mention as to the time of its service. This omission is explained if the reference is to a notice to quit as specified in the Act of 1946. It is only in s. 5 in the Act of 1946 that a notice to quit is referred to. The phrase "a notice to quit" in s. 11 (1), in my judgment, denotes a notice to quit of the particular kind set out in s. 5, that is, a notice to quit served by the lessor on the lessee at any time before the decision of the tribunal is given or within three months thereafter.

The important words of s. 11 (1) are as follows:

"... at any time when a notice to quit has been served and the period at the end of which the notice takes effect (whether by virtue of the contract, of the Act of 1946 or of this section) has not expired ..."

If the period at the end of which "the notice" takes effect is being fixed by virtue of the Act of 1946—it is plain that "the notice" referred to is a notice to quit served by the lessor on the lessee at any time before the decision of the tribunal is given or within three months thereafter. It is a notice to quit of the same kind which, in my judgment, is referred to if the period at the end of which the notice takes effect is being fixed by virtue of the contract or by virtue of s. 11. The situation denoted by s. 5 is that following a reference to a tribunal by a lessee or by a local authority a notice to quit is served by the lessor on the lessee at any time before the decision of the tribunal is given or within three months thereafter. In that situation there is, if necessary, an automatic delayed operation of the notice to the expiration of such period of three months unless the tribunal shortens the period. The effect of s. 11 (1), in my judgment, is that in the same situation there may be an application (unless the tribunal has shortened the period) to extend that period and to extend an extension, and also to extend the period of notice if the expiry date of the notice to quit is later than the expiration of three months after the decision of the tribunal. It is in keeping with this view of the matter that s. 11 (1) should contain the words "and the reference has not been withdrawn". Proviso (b) to s. 5 is in these terms:

" if the reference is withdrawn, the period during which the notice is not to take effect shall end on the expiration of seven days from the withdrawal of the reference."

As s. 5 has dealt with the situation where a reference has been withdrawn, no need arises to make any enactment by the terms of s. 11. This reinforces the view that s. 11 is concerned with the situation denoted by s. 5.

I have, therefore, reached the conclusion that the effect of the two sections, read together, is that where a notice to quit has been served in the circumstances laid down in s. 5 and where the reference has not been withdrawn, the lessee may, before the expiry of the three months' period (provided that such period applies), or within the currency of the notice, apply for an extension of the period at the end of which the notice takes effect and may from time to time apply for extensions of a period which has been extended under s. 11. For these reasons I am in agreement with the judgments delivered in the Divisional Court.

Appeal dismissed.

Solicitors: *Solicitor, Ministry of Health* (for the tribunal); *Neve, Beck & Co.*, agents for *Joseph Davies & Son*, St. Helens (for the applicant).

G.F.L.B.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., DEVLIN AND GORMAN, JJ.)

May 20, 1952

STROUD v. BRADBURY

Public Health—Statutory nuisance—Order to abate—Work not done by occupier—"Twenty-four hours' notice of intended entry"—Letter to occupier four months before entry stating intention of local authority to execute works—Public Health Act, 1936 (26 Geo. 5 and 1 Edw. 8, c. 49), s. 287 (1), proviso.

A notice under s. 39 (1) of the Public Health Act, 1936, was served by a local authority on the owner of a bungalow requiring her to carry out certain work in connection with the drainage. The owner failed to carry out the work, and on Feb. 17, 1951, the local authority wrote to her a letter, stating: "As you have not complied with the council's notice, it is intended to proceed under s. 290 (6) of the Public Health Act, 1936" [which authorised the council to enter the premises and do the work themselves]. On June 1, 1951, a sanitary inspector employed by the local authority, with a builder and his men, went to the premises to carry out the work, but the appellant, the owner's husband, refused to admit them and threatened to assault them if they tried to enter. The appellant was convicted by magistrates on an information charging him with wilfully obstructing a sanitary inspector employed by the council when acting in execution of the Public Health Act, 1936, contrary to s. 288 of the Act, and the conviction was affirmed by quarter sessions.

HELD: that the letter of Feb. 17 did not constitute a "twenty-four hours' notice of the intended entry" as required by the proviso to s. 287 (1) of the Act to be given to the occupier of the premises, and, therefore, the sanitary inspector had no right to enter, the appellant's resistance to the entry was lawful, and the conviction must be quashed.

CASE STATED by the appeal committee of East Kent Quarter Sessions.

The appellant was convicted by a court of summary jurisdiction sitting at

St. Augustine, Kent, on July 4, 1951, of having, on June 1, 1951, at Herne Bay, Kent, wilfully obstructed a sanitary inspector employed by Herne Bay Urban District Council when acting in the execution of the Public Health Act, 1936, contrary to s. 288 of that Act. He was fined £4, with £1 costs. He appealed to quarter sessions where it was proved or admitted that on Feb. 17, 1951, following the failure of the appellant's wife to carry out works for renewing a drain at her property at 83, School Lane, Herne Bay, in accordance with a notice served on her on Aug. 24, 1950, by the council under s. 39 (1) of the Act (against which notice she had appealed under s. 290 (3) of the Act to a court of summary jurisdiction which had dismissed the appeal), the respondent, the clerk of the council, wrote to her saying that the council intended to proceed under s. 290 (6) of the Act to carry out the works themselves. On a day or days before May 2, 1951, a builder, on the instructions of the council, called at the property and was given permission to measure the work for which he had been invited by the council to tender. On May 2 and 31 he called again to inform the appellant and his wife that he was coming to commence the work. On June 1, 1951, a sanitary inspector employed by the council attended at the property with the builder and his men with the intention of carrying out the work, but the appellant refused to allow the work to be carried out and threatened to assault them if they attempted to do it. The appellant contended, *inter alia*, that the council had not given the twenty-four hours' notice of intention to do the work required by s. 287 (1) of the Act of 1936. The appeal committee held that the letter of Feb. 17, 1951, was a sufficient notice to comply with s. 287 (1) and s. 290 (6) of the Act of 1936, and dismissed the appeal.

The appellant in person.

W. L. Roots for the respondent.

LORD GODDARD, C.J.: To be entitled to enter the premises to execute the works the employees of the council had to observe the provisions of the Public Health Act, 1936, s. 287 (1), which gives them that right subject to their giving proper notice of their intention. When the sanitary inspector of the council arrived, the appellant obstructed him with all the rights of a free-born Englishman whose premises were being invaded and defied him with a clothes prop and a spade. He was entitled to do that unless the sanitary inspector had a right to enter. He was brought before the justices and fined, and quarter sessions upheld the conviction. In the opinion of this court, the appellant now succeeds because the sanitary inspector had not done that which the statute required him to do before he had a right of entry. It was very necessary that the inspector should enter the premises to do this work and it was very necessary that the work should be done, but before the inspector could enter the premises he must comply with the statute. The statute provides by the proviso to s. 287 (1):

" . . . admission to any premises not being a factory, workshop or work-place, shall not be demanded as of right unless twenty-four hours' notice of the intended entry has been given to the occupier."

By s. 283 (1) of the Act the notice must be in writing. The only document relied on as a notice justifying this entry on June 1 was a letter which was written on Feb. 17, 1951, more than three months before, saying:

" This matter has now been held over for a considerable time since the appeal was dismissed by the quarter sessions committee, and, as you have

not complied with the council's notice, it is intended to proceed under s. 290 (6) of the Public Health Act, 1936."

Section 290 (6) provides:

" . . . if the person required by the notice to execute works fails to execute the works indicated within the time thereby limited, the local authority may themselves execute the works and recover from that person the expenses reasonably incurred by them in so doing and, without prejudice to their right to exercise that power, he shall be liable to a fine not exceeding £5, and to a further fine not exceeding 40s. for each day on which the default continues after conviction therefor."

It may be that the appellant's wife was liable to some penalties for not having done the work. It may be that the council are entitled to enter and do the work themselves, but before they do so they must give the proper notice. The contention that an expression of intention on Feb. 17 to proceed under s. 290 (6) of the Act of 1936 on June 1 can possibly be a twenty-four hours' notice of the intended entry is quite untenable. Therefore, the appellant was not guilty of obstructing the sanitary inspector in the execution of his duty because the sanitary inspector had no right to enter the appellant's wife's premises when he did. The appellant was entitled to order him off and prevent him from entering. The result is that the appeal is allowed, the appellant's conviction is quashed, and he must have the costs here and the costs of the appeal before the appeal committee.

DEVLIN, J.: I agree.

GORMAN, J.: I agree.

Conviction quashed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *A. C. Bradbury*, clerk of Herne Bay Urban District Council (for the respondent).

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., DEVLIN AND GORMAN, JJ.)

May 20, 1952

GLYNN AND ANOTHER v. SIMMONDS

Vagrancy—Suspected person—Frequenting a "place of public resort" with intent to commit felony—Tattersall's enclosure on racecourse—Public admitted on payment—Right of occupiers to refuse admission—Vagrancy Act, 1824 (4 Geo. 4, c. 83), s. 4.

The appellants were convicted of, being suspected persons, having frequented a place of public resort, namely Tattersall's enclosure on a racecourse during a race meeting, with intent to steal. The public were admitted to the enclosure on payment, the occupiers having the right to refuse admission and on reasonable grounds to require anyone to leave.

HELD: that the enclosure was a "place of public resort" within the meaning of s. 4 of the Vagrancy Act, 1824, and the convictions were right.

CASE STATED by the appeal committee of West Sussex Quarter Sessions.

The defendants appealed to quarter sessions against their convictions on Aug. 3, 1951, by a court of summary jurisdiction sitting at Chichester, of, being suspected persons, having on Aug. 2, 1951, frequented a place of public resort, namely, Tattersall's enclosure, Goodwood Racecourse, West Sussex, with intent to commit a felony, namely, to steal therein, contrary to the Vagrancy Act, 1824, s. 4. At a race meeting attended by a large number of the public on Aug. 2, 1951, the defendants were arrested in Tattersall's enclosure on the racecourse by two police officers in plain clothes who observed one of them on three occasions put his right hand under the jacket of a man in the region of his hip pocket while the other pushed the man from behind. Tattersall's enclosure comprised the grand stand, the space between the grand stand and the actual course which was known as "the lawn" where bookmakers stood in two or three rows, and another part connected with the lawn by a passageway under the grand stand by which access was obtained to two refreshment bars and a lavatory. Members of the public were admitted to Tattersall's enclosure for the day only on payment of £1 10s. and also to another enclosure, the paddock, on payment of a further £2 10s. It was assumed on the facts without evidence that the occupiers of Tattersall's enclosure had the right to refuse admission to anyone who applied therefor and also on reasonable grounds to require anyone to leave. At the hearing of the appeal on Sept. 28, 1951, the defendants contended that there was no evidence to bring them within the category of suspected persons or that they frequented any place, and they further contended that Tattersall's enclosure was not a place of public resort. The appeal committee held, as contended by the prosecutor, a superintendent of police, that there was such evidence and that Tattersall's enclosure was a place of public resort. They, therefore, dismissed the appeals, and the defendants appealed to the Divisional Court.

M. J. Morris for the defendants.

P. A. Harmsworth for the prosecutor.

LORD GODDARD, C.J.: The defendants were two pickpockets who were observed by two police officers in Tattersall's enclosure at the Goodwood race meeting last summer on two occasions pushing through the crowd round the bookmakers' stands and endeavouring to pick pockets. It is contended that that conduct brought the defendants within the category of suspected

persons. They then walked along a crowded passage-way and one of them entered a lavatory which was also crowded and the other one stood outside. Pickpockets frequently work in pairs, one trying to pick pockets while the other jostles the victim. When the one defendant came out of the lavatory the two defendants walked through the crowd together to the refreshment bars. On the way they endeavoured to pick a pocket, and then, when they were standing at one of the bars, the police arrested them.

I cannot see that the justices could have had any option but to come to the conclusion that the defendants were frequenting this place for the purpose of committing a felony. The question, however, arises whether this enclosure was a "place of public resort". They were in Tattersall's enclosure, to which the public are admitted on payment of 30s. A place does not cease to be a place of public resort because the public have to pay to go there. An exhibition is obviously a place of public resort. The Zoological Gardens are, no doubt, a place of public resort because the public are invited to go there, and they enter the gardens on payment of a sum of money. So is a racecourse—not an open course like Newmarket, Brighton or Ascot, but a course in a park. They are all places of public resort because the owners or occupiers invite the public to go there, but it is said that because a person who has been warned off, or any other undesirable character, will not be allowed into Tattersalls or into a racecourse, that prevents it from being a place of public resort. It must be to some extent a question of degree, but I cannot see that property to which the owner invites the public to resort becomes any the less a place of public resort because he refuses to allow a particular individual or individuals to enter. If he limits admission to a certain category of people, for instance, if he allows only members of the universities of Oxford or Cambridge to go to a stand or a window he has got at the Boat Race, it may be said that that stand or window is not a place of public resort. It has been suggested to us that a good analogy is the Royal Enclosure at Ascot, but that is not a place of public resort because the public are not invited to go to the Royal Enclosure. Those who wish to go to the Royal Enclosure have to apply for permission. Everybody is invited to Tattersall's enclosure, subject to his paying 30s. and subject to the right of the keeper of the gate to say he will not be allowed to enter. The justices have found that the enclosure was a place of public resort, and, in my opinion, they had no option since it did not cease to be a place of public resort because a payment for entry was demanded, nor, in my judgment, did it cease to be a place of public resort because the occupier reserved the right to refuse admission to some particular individual or individuals. For these reasons I think the justices came to a right decision and this appeal is dismissed with costs.

DEVLIN, J.: I agree.

GORMAN, J.: I agree.

Appeal dismissed.

Solicitors: *Henry I. Sydney & Co.* (for the defendants); *Walmesley & Stansbury*, agents for *J. E. Dell & Loader*, Shoreham-by-Sea (for the prosecutor).

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., DEVLIN AND GORMAN, JJ.)

May 23, 1952

LAWRENCE v. HOWLETT

Road Traffic—"Motor vehicle"—Mechanically propelled vehicle—Dual-purpose vehicle—Bicycle fitted with auxiliary engine—Use after removal of essential parts of engine—Road Traffic Act, 1930 (20 and 21 Geo. 5, c. 43), s. 1, s. 35 (1).

The appellant was convicted by magistrates of using a motor vehicle in relation to the user of which no policy of insurance against third party risks was in force, contrary to s. 35 (1) of the Road Traffic Act, 1930. The vehicle was a bicycle fitted with an auxiliary engine, but it could also be used as an ordinary pedal bicycle. At the time of the offence charged essential parts of the engine had been removed and it could not be used otherwise than as an ordinary pedal bicycle, and the appellant was so using it.

HELD: that at the material time the vehicle did not fall within the classification of a "motor vehicle" within the meaning of s. 1 and s. 35 (1) of the Act, and the conviction must be quashed.

CASE STATED BY Middlesex justices.

At a court of summary jurisdiction, sitting at Brentford, an information was preferred by the respondent, a police officer, charging that the appellant used a motor vehicle on a road without there being in force in relation to its user a policy of third-party insurance, contrary to s. 35 (1) of the Road Traffic Act, 1930. It was proved or admitted that while the appellant was riding a pedal bicycle which was fitted with an auxiliary motor he was thrown off his machine due to the sheering of the bolt of the engine engagement lever. No policy of insurance was then in force. There was some petrol in the tank of the bicycle, but the auxiliary motor was not in working condition, the cylinder, piston, and connecting rod having been removed, and the appellant was using the vehicle as a pedal cycle. It was contended on behalf of the appellant that at the time of the alleged offence the machine was not a "motor vehicle" within the meaning of s. 1 of the Act of 1930, since it was not mechanically propelled, and that, therefore, it was not subject to the requirement of s. 35 (1) of the Act. The justices were of the opinion that the machine was a motor vehicle within the meaning of s. 1 of the Road Traffic Act, 1930, and that the offence charged had been committed.

Skelhorn for the appellant.

Vernon Gattie for the respondent.

LORD GODDARD, C.J.: This is a Case stated by Brentford justices before whom the appellant was charged with using on a road a motor vehicle in respect of which there was not in force an insurance policy as required by the Road Traffic Act, 1930. The vehicle in question was a bicycle, a dual-purpose machine which could be used either mechanically or as pedal-driven. The justices found that on the day in question the auxiliary motor fitted to the appellant's cycle was not in working order because certain vital parts, namely, the cylinder, piston, and connecting rod, had been removed by the appellant, though there was some petrol in the tank. That seems to suggest that the removal of those parts had been a mere temporary removal, and, no doubt, the appellant intended at some time to replace them, but the justices also found that at the material time the appellant was riding the machine simply as a pedal cycle.

The question, therefore, is, whether or not on those findings the justices were entitled to hold that on the occasion in question the appellant was using a mechanically propelled vehicle on the road without a policy of insurance being

in force in relation to its user. The Road Traffic Act, 1930, provides by s. 1:

"This Part of this Act shall apply to all mechanically propelled vehicles intended or adapted for use on roads (in this Act referred to as 'motor vehicles') . . ."

In the opinion of the court, the words "mechanically propelled vehicles", though words of classification, are not words of definition, and where a vehicle, which is, to use a convenient expression, a dual-purpose vehicle, is found, as the justices have found in the present case, to have been so treated that on the day of the alleged offence it could not be mechanically propelled, though it could be, and was being, used as a pedal cycle, the user is not bound to have in force an insurance policy relating to the user of the vehicle. It is true that to some extent the finding of the justices that this was a motor vehicle may be one of fact, but I do not think that that is consistent with their finding that the appellant was riding the machine simply as a pedal cycle. Not without a certain amount of hesitation, I have come to the conclusion that this appeal must be allowed.

DEVLIN, J.: I come to the same conclusion, but also with a certain amount of hesitation. The question is whether this vehicle was a mechanically propelled vehicle within the meaning of s. 1 of the Road Traffic Act, 1930, and that section is one of a group of sections which is headed: "Classification of motor vehicles". I am, therefore, satisfied, that the words "mechanically propelled" are intended as words of classification and *prima facie* do not refer to the way in which a vehicle is being propelled at any given moment. A motor car is a mechanically propelled vehicle. It is designed so that it has only a mechanical means of propulsion, and, therefore, I should hold that, whatever its use might be at any given moment, whether it was in working order or whether it was being driven on a free-wheel or driven downhill with the engine disengaged, it still was being used as a mechanically propelled vehicle. Where, however, a vehicle is designed to have two means of propulsion, one mechanical and the other non-mechanical, different questions are raised, and to see into which classification it comes regard must be had to its working condition and the use to which it is being put at the material time. I agree also that to some extent it is a question of fact and of degree, but in view of the justices' finding of fact that the auxiliary motor was not in a working condition at the material time and that the appellant was riding the machine simply as a pedal cycle, I think the conclusion is irresistible that the cycle did not fall within the classification of a mechanically propelled vehicle.

GORMAN, J.: I agree. I think this is an exceptional case and must not be taken to be in any way extended beyond its particular facts.

Appeal allowed.

Solicitors: *A. J. A. Hanhart* (for the appellant); *Solicitor, Metropolitan Police* (for the respondent).

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., DEVLIN AND GORMAN, JJ.)

May 21, 1952

REG. v. COCKRAM (VALUATION OFFICER); *Ex parte* EAST MIDLANDS
ELECTRICITY BOARD

Rating—Electricity hereditament—Proposal by electricity company for amendment of valuation list—Proposal not determined on April 1, 1948—Vesting of hereditament in Electricity Board—Deletion of hereditament from valuation list—Validity of amendment—Local Government Act, 1948 (11 and 12 Geo. 6, c. 26), s. 85 (1), s. 92 (3), s. 92 (4).

On Mar. 27, 1946, an electricity company made a proposal under s. 37 (1) of the Rating and Valuation Act, 1925, for the amendment of the valuation list in respect of two hereditaments occupied by the company, on the ground that the assessments were excessive. The proposal had not been determined on Apr. 1, 1948, on which date, under the Electricity Act, 1947, the hereditaments vested in the East Midlands Electricity Board. Pursuant to s. 92 (3) of the Local Government Act, 1948, the hereditaments were deleted from the valuation list in the manner prescribed by r. 6 (ii) of the Rating and Valuation Acts (Form of Valuation List) Rules, 1932, that is to say, by lines being ruled through the words and figures so as to leave legible the original entries. Regulation 3 (1) of the Rating and Valuation (Transitional) Regulations, 1949, provided that the proposal was to be treated for the purpose of the Act of 1948 as a proposal served on the valuation officer on Feb. 1, 1950, under s. 40 of the Act. On Oct. 18, 1950, an agreement was arrived at between the board, the rating authority, and the valuation officer that the list should be altered substantially in agreement with the proposal of Mar. 27, 1946, and that the alteration should take effect as from Oct. 1, 1945, but on Oct. 20, 1951, the valuation officer informed the board, that, as the hereditaments had been deleted from the list under s. 92 (3) of the Act of 1948, the alteration could not be made.

HELD: that, as, by s. 92 (4) of the Act of 1948, the provisions of sub-s. (3) were to be "without prejudice to the making or effect of any proposal made under the provisions of Part III of this Act [which included s. 40] relating to the alteration of valuation lists", the valuation list could be altered so as to give effect to the original proposal of Mar. 27, 1946, despite the provisions of s. 20 (1) of the Rating and Valuation Act, 1925, that the valuation list as in force at the time when the value of the premises was to be determined was to be conclusive evidence of the values of the hereditaments included in the list.

MOTION by the East Midlands Electricity Board.

On Mar. 27, 1946, a proposal for the amendment of the valuation list in respect of two hereditaments occupied by the Northampton Electric Light and Power Co., Ltd., for the purposes of its works was made by the company under the Rating and Valuation Act, 1925, s. 37 (1), on the ground that the assessments were incorrect, excessive, and unfair, and ought to be reduced. The proposal had not been determined by the assessment committee on Apr. 1, 1948, when the hereditaments vested in the East Midlands Electricity Board under the Electricity Act, 1947. On June 11, 1948, pursuant to the Local Government Act, 1948, s. 92 (3), the assessment committee caused the hereditaments to be deleted from the valuation list. The deletion was made in accordance with the Rating and Valuation Acts (Form of Valuation List) Rules, 1932, r. 6 (ii), by ruling lines through the words and figures in such manner as to leave legible the original entries. By the Rating and Valuation (Transitional) Regulations, 1949, reg. 3 (1), the proposal of Mar. 27, 1946, was to be treated as a proposal served on the valuation officer on Feb. 1, 1950, under s. 40 of the Act of 1948. On Feb. 18, 1950, the valuation officer gave to the board notice of objection to the proposal, and on Feb. 28, 1950, the board gave notice of appeal to the local valuation

court. On Oct. 18, 1950, the board, the rating authority, and the valuation officer (being all the parties to the board's appeal to the local valuation court) agreed that the valuation list should be altered in pursuance of the proposal, with effect from Oct. 1, 1945. By a letter, dated Oct. 20, 1951, the valuation officer said that, since the hereditaments had been deleted from the valuation list in accordance with s. 92 (3) of the Act of 1948, it was no longer possible for an alteration to be made to give effect to the agreement of Oct. 18, 1950. In consequence of his refusal the board was unable to obtain from the rating authority a refund of £17,139 7s. 11d., in respect of rates overpaid by the electricity company between Oct. 1, 1945, and Mar. 31, 1948. The board obtained leave to apply for an order of mandamus directed to the valuation officer for the Northampton valuation area requiring him to cause such alteration to be made in the valuation list for the county borough of Northampton as would give effect to the proposal for the amendment of the valuation list.

Sir Arthur Comyns Carr, Q.C., and *Squibb* for the applicants, East Midlands Electricity Board.

The Attorney-General (Sir Lionel Heald, Q.C.), and *Maurice Lyell* for the valuation officer.

LORD GODDARD, C.J., stated the facts and continued: By the Local Government Act, 1948, s. 85 (1):

" . . . no premises which are or form part of . . . (b) a hereditament occupied by the British Electricity Authority . . . shall be liable to be rated or be included in any valuation list or in any rate, and . . . the British Electricity Authority . . . shall . . . make such payments for the benefit of local authorities as are provided for by [s. 96 of the Act] in lieu of the rates which would . . . be payable to rating authorities in respect of those hereditaments."

By s. 92 (3) of the Act it was the duty of assessment committees to cause all such alterations of the valuation lists to be made as were necessary to secure that no hereditament occupied on Apr. 1, 1948, by the British Electricity Authority (other than a hereditament used as a dwelling-house) remained on the valuation list. On June 11, 1948, pursuant to s. 92 (3), the assessment committee caused the hereditaments in regard to which the proposal of Mar. 27, 1946, was made to be deleted from the list. Under the Rating and Valuation Acts (Form of Valuation List) Rules, 1932 (S.R. & O., 1932, No. 395), r. 6 (ii), where a valuation list has to be altered for any reason:

" a line shall be ruled through any words or figures which require to be omitted . . . in such manner as to leave legible the original entries."

Thus, if it is necessary to refer to the original entry, there will be no difficulty in seeing what it is. That is the way in which the hereditaments were deleted from the valuation list in this case.

The Attorney-General has contended that, as the Rating and Valuation Act, 1925, s. 20 (1), provides that

" . . . the valuation list as in force at the time when the rate is made or the value of the premises is to be determined, shall be conclusive evidence of the values of the several hereditaments included in the list . . ."

there is nothing which will entitle the rated occupier of the premises to recover the rates after a hereditament is removed from the valuation list. It would be strange, however, if an Act which did not contain clear words to that effect were to deprive a person of a right which had accrued before the Act came into

force. The ratepayers had a right to make the proposal of Mar. 27, 1946, and, if the proposal was found to be well founded, as it was, they have a right to recover the money. By the Rating and Valuation (Transitional) Regulations, 1949, reg. 3 (1):

"Any proposal for the amendment of a valuation list made by or served on a rating authority before the appointed day [Feb. 1, 1950] under s. 37 (1) of the Act of 1925, being a proposal which has not been determined by an assessment committee, shall be treated for the purposes of the Act of 1948 as a proposal made by or served on a valuation officer on the said day under s. 40 or s. 41 of that Act as the case may require."

In my opinion, the matter is put beyond doubt by s. 92 (4) of the Local Government Act, 1948. The duty of the rating authority to remove the hereditaments from the valuation list arises under s. 92 (3), and by s. 92 (4):

"The provisions of the last preceding sub-section shall be without prejudice to the making or effect of any proposal made under the provisions of Part III of this Act [which includes s. 40 and s. 41] relating to the alteration of valuation lists by means of proposals made by or served on valuation officers . . ."

It seems to me that the words at the beginning of s. 92 (4) are conclusive of the matter, and, accordingly, mandamus must go.

DEVLIN, J.: I agree.

GORMAN, J.: I also agree.

Mandamus granted.

Solicitors: *R. A. Finn, agent for A. J. D. Langford, Nottingham (for the applicants); Solicitor of Inland Revenue (for the valuation officer).*

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., DEVLIN AND GORMAN, JJ.)

May 23, 1952

WATSON v. HERMAN

Firearms—Component part—Telescopic sight for rifle—Whether covered by certificate for rifle and silencer—Firearms Act, 1937 (1 Edw. 8 and 1 Geo. 6, c. 12), s. 1 (1), s. 32 (1).

The appellant was in possession of a .22 rifle fitted with a removable telescopic sight. He had a firearm certificate authorising him to possess a rifle and a silencer, but he held no certificate relating to the sight. Justices, being of opinion that the efficiency and lethal quality of the rifle were improved by the addition of the telescopic sight, convicted the appellant on an information charging him with unlawfully having in his possession a component part of a firearm, namely, a telescopic sight, otherwise than as authorised by a firearm certificate held by him, contrary to s. 1 (1) of the Firearms Act, 1937.

HELD: that the sight was not a "firearm" within the definition of the term contained in s. 32 (1) of the Act; that no separate firearm certificate in respect of it was required; and that the conviction must be quashed.

CASE STATED by city of York justices.

At a court of summary jurisdiction sitting at York on Dec. 6, 1951, an information was preferred by the respondent, the chief constable of the city of York,

charging that the appellant did unlawfully have in his possession a certain component part of a firearm, viz., a telescopic sight, otherwise than as authorised by a firearm certificate held by him, contrary to s. 1 of the Firearms Act, 1937. The appellant was in possession of a .22 rifle fitted with a telescopic sight, but not fitted with a sound moderator. He had a firearm certificate authorising him to purchase or acquire one .22 B.S.A. Sportsman 15 rifle and one sound moderator, but he had not applied for a certificate regarding the telescopic sight. The telescopic sight was not an original part of the rifle as manufactured by the makers, but it had been made by the appellant and could be attached to the rifle if and when it was desired to use it and detached after use. The rifle was designed to be and could be used without the telescopic sight. It was contended for the respondent that the telescopic sight was "a component part", and, therefore, "a firearm" within the definition of s. 32 (1) of the Act, and, as it was not included in the certificate, the appellant was guilty of the offence charged. On the part of the appellant it was contended that the telescopic sight was merely an accessory and need not be separately included in the firearm certificate. The justices were of opinion that the contention of the respondent was correct because the efficiency and lethal quality of the weapon were improved by the addition of the telescopic sight, and found the charge proved, but discharged the appellant absolutely. The appellant appealed.

E. Ould for the appellant.

E. H. P. Wrightson for the respondent.

LORD GODDARD, C.J.: This is a Case stated by justices of the peace for the city of York, before whom the appellant was summoned for

"Having in his possession a certain component part, viz., a telescopic sight, to which Part I of the Firearms Act, 1937, applies otherwise than as authorised by a firearm certificate held by him, contrary to s. 1 of the Firearms Act, 1937."

The appellant had a firearm certificate which entitled him to have a rifle in his possession, and he also had a telescopic sight. A telescopic sight, one knows well, is used for sighting the rifle for firing at targets, and it can be put on and taken off. If it is merely a part of a complete rifle then, of course, a separate certificate is not required. If one required a certificate for every component part of a rifle I do not know how many certificates one would want. The justices thought that, because the telescopic sight improved the lethal quality of the weapon, therefore a separate certificate for it was required or the sight had to be separately mentioned in a certificate. I can find no justification for that. The certificate for the rifle must extend to its component parts. If one has a component part which is not made up into, so as to be part of, the rifle, it may be that one requires a certificate for it, but the only accessory which requires to be mentioned is an accessory "designed or adapted to diminish the noise or flash caused by firing the weapon". I think the justices came to a wrong decision, and the appeal must be allowed with costs.

DEVLIN, J.: I agree.

GORMAN, J.: I agree.

Appeal allowed.

Solicitors: *C. Grobel, Son & Co.*, agents for *G. F. Mitchell*, York (for the appellant); *Sharpe, Pritchard & Co.*, agents for *T. C. Benfield*, town clerk, York (for the respondent).

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., JONES AND PARKER, JJ.)

May 14, 15, 23, 1952

REG. v. NOTTINGHAM QUARTER SESSIONS. *Ex parte* HARLOW

Public Health—Dustbin—Notice to owner to provide—Appeal by owner to court of summary jurisdiction—Notice set aside by justices—Right of local authority to appeal to quarter sessions—“Person aggrieved”—Public Health Act, 1936 (26 Geo. 5 and 1 Edw. 8, c. 49), s. 301.

A local authority, pursuant to its powers under s. 75 (1) of the Public Health Act, 1936, served a notice on the applicant, as agent of the owners of a building, requiring him to provide a dustbin for the premises. On appeal by the applicant to a court of summary jurisdiction the notice was set aside, but the court made no order as to costs. The local authority appealed to quarter sessions under s. 301 of the Act, and its appeal was allowed. The applicant obtained leave to apply for an order of certiorari to bring up and quash the order of quarter sessions on the ground that the local authority was not a “person aggrieved” by the order of the justices within the meaning of s. 301, and that, accordingly, it had no right of appeal to quarter sessions.

Held: (i) that the authority was a “person” within the meaning of s. 301.

Rez v. Surrey Quarter Sessions Appeal Committee. Ex parte Lilley (1951) (115 J.P. 507), applied.

(ii) that, as a result of the order of the justices, the local authority was left with a legal burden which it would have discharged if the order had not been made, and, therefore, it was a “person aggrieved” within s. 301 and had a right of appeal to quarter sessions.

Dictum of JAMES, L.J., in *Ex p. Sidebotham. Re Sidebotham* (1880) 14 Ch.D. 458, 465, applied.

MOTION for order of certiorari.

The applicant, Harlow, was the agent of the owners of premises known as 33, Peas Hill Rise, Nottingham. By a notice dated Apr. 26, 1951, the Nottingham City Council, pursuant to its powers under s. 75 (1) of the Public Health Act, 1936, required the applicant to provide a dustbin for the premises. The applicant appealed under s. 75 (1) to a court of summary jurisdiction at Nottingham which allowed his appeal and ordered that the notice and requirement be void and of no effect. The court made no order as to costs. From that decision the council appealed to Nottingham City Quarter Sessions, which, on Sept. 28, 1951, ordered that the council's appeal be allowed and quashed the order of the magistrates, leaving the council's notice and requirement in force. The applicant obtained leave to apply for an order of certiorari to quash the order of quarter sessions on the ground that quarter sessions had no jurisdiction to entertain the council's appeal, the contentions being (i) that the council was not “a person” within the meaning of s. 301 of the Act; (ii) that, in any event, the council was not “a person aggrieved” within the meaning of that section. Section 301 gives a right of appeal to quarter sessions to “a person aggrieved by any order, determination or other decision of a court of summary jurisdiction”.

Elwes, Q.C., and *Lymbery*, for the applicant.

Marshall, Q.C., and *Cotes-Freedy*, for the council.

Cur. adv. vult.

May 23. PARKER, J., read the following judgment of the court. The applicant is the agent of the owners of premises known as 33, Peas Hill Rise, in the city of Nottingham. By a notice, dated Apr. 26, 1951, the Nottingham City Council, pursuant to its powers under the Public Health Act, 1936, s. 75 (1), required the applicant to provide a dustbin for the premises. The applicant,

as he was entitled to do, appealed to the court of summary jurisdiction sitting at the Guildhall, Nottingham, and on May 30, 1951, that court allowed the appeal and ordered that the said notice and requirement of the respondent council be void and of no effect. The court made no order as to costs. From that order of the justices the council appealed to Nottingham City Quarter Sessions who, on Sept. 28, 1951, ordered that the appeal be allowed and quashed the order of the justices, leaving the notice and requirement of the council in force.

Counsel for the applicant now moves for an order of certiorari to bring up and quash that order of quarter sessions on the ground that quarter sessions had no jurisdiction to entertain the council's appeal. He contends (i) that the council was not "a person" within s. 301 of the Public Health Act, 1936; (ii) that, in any event, the council was not "a person aggrieved" within that section; and that, accordingly, the council had no right of appeal to quarter sessions. As regards the first contention, the court is clearly of opinion that the council is a "person" within that section. Indeed, the matter is concluded by the decision of this court in *Rez v. Surrey Quarter Sessions Appeal Committee. Ex p. Lilley* (1). It is true that in that case the court was considering another Act, the Nurseries and Child-Minders Regulation Act, 1948, but by s. 6 (5) of that Act s. 300 to s. 302 of the Public Health Act, 1936, were made to apply, and the court had to construe s. 301 of the latter Act, and held that the local authority was "a person" within that section.

The other question, viz., whether the respondent council was "a person aggrieved", is more difficult, since the court of summary jurisdiction merely allowed the applicant's appeal and did not make any order for costs against the council. Had such an order been made, then, clearly, as was held in the *Surrey* case (1), the council would have been "aggrieved". In approaching this question it is important to bear in mind what LORD HEWART, C.J., said in *Sevenoaks Urban District Council v. Twynam* (2):

"Now undoubtedly those words, 'a person aggrieved', have very often been considered, and, if one looked at the mere terms apart from their context and apart from the particular circumstances, it would have been quite easy to marshal decisions of contradictory import. But as has been said again and again there is often little utility in seeking to interpret particular expressions in one statute by reference to decisions given upon similar expressions in different statutes which have been enacted *alio intuitu*. The problem with which we are concerned is not, what is the meaning of the expression 'aggrieved' in any one of a dozen other statutes, but what is its meaning in this part of this statute?"

Turning, then, to the Public Health Act, 1936, it is to be observed, without going through the Act in detail, that numerous powers are given to and duties and burdens imposed on local authorities. They can make a variety of requirements, refusals, decisions and determinations, and from these the member of the public concerned is given a right of appeal to courts of summary jurisdiction, which by s. 300 (1) is to be by way of complaint. Local authorities are also given the right to sue in such courts for expenses: [see s. 293]. It is from decisions of courts of summary jurisdiction in all such matters, in some of which the local authority will have been the defendants to a complaint, and, in others, the complainants, that a right of appeal to quarter sessions is given by s. 301. That section provides:

- (1) 115 J.P. 507; [1951] 2 All E.R. 659; [1951] 2 K.B. 749.
- (2) 93 J.P. 189, 190; [1929] 2 K.B. 440, 443.

"Subject as hereinafter provided, where a person aggrieved by any order, determination or other decision of a court of summary jurisdiction under this Act is not by any other enactment authorised to appeal to a court of quarter sessions, he may appeal to such a court: Provided that nothing in this section shall be construed as conferring a right of appeal from the decision of a court of summary jurisdiction in any case if each of the parties concerned might under this Act have required that the dispute should be determined by arbitration instead of by such a court."

The proviso does not matter for the purpose of this case. *Prima facie*, a local authority who have either gone to a court of summary jurisdiction as complainants, or have been brought before such a court as defendants to a complaint and have failed, are, one would have thought, in common parlance, "a person aggrieved".

Turning, next, to the sections of the Act concerning a local authority's powers and duties as sanitary authority, one finds that by s. 72 (1) (a) the local authority, if so required by the Minister of Health, as was the case here, are charged with the duty of removing house refuse, for which purpose dustbins are clearly necessary, and, by s. 72 (2), they can be compelled to perform that duty. By s. 75 (1) the local authority can require an owner or an occupier of premises to provide dustbins, and a right of appeal to a court of summary jurisdiction is given to a person aggrieved by such a requirement. Provision is also made, in s. 75 (3), empowering the local authority themselves to provide dustbins, and to make an annual charge therefor. Accordingly, once the court of summary jurisdiction in the present case had declared null and void the notice and requirement to the applicant, as agent for the owners, to provide a dustbin, the respondent council would have to fulfil its duties in some other way. It would either have to provide a dustbin itself, or serve a notice on the occupier requiring him to do so with the risk of being taken by the occupier to the court, and having to incur and, possibly, to pay, costs. In other words, the council is left with a legal burden which, if the order of the court of summary jurisdiction had not been made, the council would have discharged. In those circumstances, the council is, in our view, "a person aggrieved".

Reference, however, was made in the course of the argument to a number of cases, and, in particular, to *Rex v. London Sessions Appeal Committee. Ex p. Westminster City Council* (1) and to the *Surrey* case (2), which, it is said, require us to hold that the council was not "a person aggrieved". In the *Westminster* case (1), the court had to consider the London County Council (General Powers) Act, 1947, empowering borough councils to register street traders and to grant, renew, vary and revoke licences to street traders. Under s. 25 (1) a trader has a right of appeal to a court of summary jurisdiction, and from an order of that court "any person deeming himself aggrieved" can appeal to quarter sessions under s. 64. The Westminster City Council cancelled the registration of certain street traders who appealed to a metropolitan magistrate. The cancellations having been reversed by the magistrate, the city council sought to appeal to quarter sessions. This court held not only that, as a matter of the construction of that Act, the city council was not "a person", but that, in any event, it was not "a person aggrieved". That case, as it seems to us, is clearly distinguishable. The cancellation of the registration cast no legal burden on the city council, and, while it might have been annoyed or disappointed at the magistrate's decision, it was not aggrieved thereby.

(1) 115 J.P. 350; [1951] 1 All E.R. 1032; [1951] 2 K.B. 508.

(2) 115 J.P. 507; [1951] 2 All E.R. 659; [1951] 2 K.B. 749.

In the *Surrey* case (1), the principal of a nursery school applied to the Surrey County Council to be registered under the Nurseries and Child-Minders Regulation Act, 1948, as a child-minder. The council made an order registering her subject to certain conditions and, objecting to the conditions, she appealed to a court of summary jurisdiction. The court held that the Act did not apply to the applicant's premises and, accordingly, that the council had no power to make the order, and they made an order for costs against the council. By s. 6 (5), the Act of 1948 incorporated s. 301 of the Public Health Act, 1936, and the council appealed to quarter sessions. This court held that the council was "a person aggrieved", since an order for costs had been made against it, but it is clear from the judgments that, but for the order for costs, the court would have held to the contrary. That case also is, in our view, distinguishable and for the same reasons. The cancellation of the council's order did not result in any legal burden being cast on the council.

Both in the *Westminster* case (2) and in the *Surrey* case (1) reliance was placed on *Ex p. Sidebotham. Re Sidebotham* (3) and *Reg. v. London County Keepers of the Peace & JJ.* (4), but neither of these cases seems to us to conflict in any way with the view which we have formed in the present case. Indeed, in *Ex p. Sidebotham* (3) JAMES, L.J., said:

"But the words 'person aggrieved' do not really mean a man who is disappointed of a benefit which he might have received if some other order had been made. A 'person aggrieved' must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something."

We think that the respondent council in the present case can be said to come within that definition. But, in any event, it is to be observed that, as LORD ESHER, M.R., pointed out in *Ex p. Official Receiver. Re Reed, Bowen & Co.* (5), that definition does not purport to be and is not an exhaustive definition.

The only case which has caused doubt in our minds is *Reg. v. Hannam* (6). In that case the corporation of Ramsgate rated the Ramsgate Smackowners' Ice Co. in respect of certain premises. The company failed to pay and the corporation took out a summons for an order for payment, under the Public Health Act, 1875, s. 256. The justices refused to make the order on the ground that, by reason of certain local Acts, the premises were exempt from rates. A rule nisi for a mandamus was made absolute by the Queen's Bench Division to compel the justices to make an order for payment on the ground that they had no power to inquire into the validity of the rate, since, the company not having appealed to quarter sessions against it, the rate was good on the face of it. In dismissing the appeal, the Court of Appeal had to consider whether the corporation could have appealed under the Public Health Act, 1875, s. 269, against the justices' decision, since, if so, a mandamus would not have been the proper remedy. On that matter LORD ESHER, M.R., said:

"But that section only applied to a person aggrieved—that was a person against whom an order was made throwing a burden upon him—and it did not give an appeal to a rating authority."

(1) 115 J.P. 507; [1951] 2 All E.R. 659; [1951] 2 K.B. 749.

(2) 115 J.P. 350; [1951] 1 All E.R. 1032; [1951] 2 K.B. 508.

(3) (1880), 14 Ch.D. 458, 465.

(4) (1890), 25 Q.B.D. 357; *sub nom. Reg. v. London JJ. Ex p. Fulham Vestry*, 55 J.P. 56.

(5) (1887), 19 Q.B.D. 174, 178.

(6) (1886), 2 T.L.R. 234.

No argument on this point is set out in the report, nor is the passage cited above easy to follow. The corporation were plaintiffs who had failed before the justices and, we should have thought, were "aggrieved" within the definition given by JAMES, L.J., in *Ex p. Sidebotham* (1). It may be that the real point taken was that the corporation was not "a person" within s. 269 of the Public Health Act, 1875. The requirement in s. 269 (2) that the appellant should give notice to the authority lends support to the view that the corporation could not appeal. It is enough, however, for us to reiterate the words of LORD HEWART, C.J., in *Sevenoaks Urban District Council v. Twynam* (2) and to consider, as we have to, the position under the relevant provisions of the statute in question in this case. This application must be refused.

Application dismissed.

Solicitors: *Peacock & Goddard*, agents for *Browne, Jacobson & Hallam*, Nottingham (for the applicants); *Sharpe, Pritchard & Co.*, agents for *T. J. Owen*, town clerk, Nottingham (for the respondent council).

T.R.F.B.

(1) (1880), 14 Ch.D. 458, 465.

(2) 93 J.P. 189, 190; [1929] 2 K.B. 440, 443.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., HILBERY AND DEVLIN, JJ.)

May 27, 1952

HITCHCOCK v. W. B. AND OTHERS

Adoption—Dispensing with consent to order—"Consent . . . unreasonably withheld"—Matters to be considered—Attitude and wishes of dissenting parent—Relevancy of child's welfare—Adoption Act, 1950 (14 Geo. 6, c. 26), s. 3 (1) (c).

In determining whether the consent of a parent to the adoption of his child has been unreasonably withheld, within the meaning of s. 3 (1) (c) of the Adoption Act, 1950, the test is not the welfare of the child, but the attitude of the parent, i.e., whether he is unreasonable, as a parent, in withholding his consent. If a parent has an honest desire to keep his child, and can contribute to his upkeep, he cannot be said to be withholding his consent unreasonably, notwithstanding that he has no home immediately available for the child.

CASE STATED by Newport justices.

On June 4, 1949, Robert Hitchcock, the appellant (referred to hereafter as the father), and Isabella Hitchcock, the third respondent (referred to hereafter as the mother), were married. The father had a criminal record before the marriage, and on June 6, 1949, he was arrested for stealing money, with which he had bought dresses for the mother before the marriage, and was put on probation. Six weeks after the marriage the mother left him and had lived apart from him ever since. On Feb. 12, 1950, a son was born of the marriage, but the mother did not allow the father to see the infant, and refused to disclose to the father where he was or to send to the infant a cot and other articles which the father had bought for him. In March, 1950, she put the infant out to foster parents. In May, 1950, the father was sentenced to four months' imprisonment for a breach of the probation order. On May 25, the mother obtained from a court of summary jurisdiction, sitting at Trowbridge, Wiltshire, an order for the custody of the infant, and the father was ordered to pay the weekly sum of one shilling for the infant's maintenance. From Dec. 6, 1950, the father had been

employed as a ward orderly in a hospital in Wiltshire, where he had shown himself a good worker and had proved himself very satisfactory. In April, 1951, he was found guilty of stealing a registered letter in September, 1950, and was put on probation for three years. On Apr. 17, 1951, he applied to the justices at Trowbridge to revoke the order of May 25, 1950, but his application was dismissed, and on July 18, 1951, an appeal by him from the order of the justices was dismissed by ROMER, J., who said that the father seemed to want to have the infant, but it was impossible to hand him over to him, and that it might be in the best interests of the infant that he should be adopted into a good home. He also said that, if the infant was not adopted, nothing in the proceedings before him would prejudice any future application by the father to have the infant.

At a court of summary jurisdiction, sitting at Newport on Nov. 16, 1951, and Dec. 4, 1951, an application was made by the first and second respondents (referred to hereafter as the adopters), under the Adoption Act, 1950, (a) for an adoption order in respect of the infant, and (b) that the court should, under s. 3 (1) (c) of the Act, dispense with the father's consent on the ground that it was unreasonably withheld. The grounds for alleging that the consent was unreasonably withheld were specified in the statement supplied to the court by the adopters under the Adoption of Children (Summary Jurisdiction) Rules, 1949, r. 1, as being that the mother had been given the legal custody of the infant by the order of the justices, dated May 25, 1950, and that the father's application to have the order revoked had been dismissed by the justices by their order of Apr. 17, 1951, which was affirmed by ROMER, J.

It was contended, *inter alia*, on behalf of the father (a) that he could not be held to have withheld his consent unreasonably when he genuinely desired the infant and had taken such steps as he could to help him and to be given the custody of him, and when, after his lapse into dishonesty, he had led an honest and industrious life and given reasonable indication of becoming a decent and honest parent, and (b) that it was in the interests of the infant that his natural father should have care of him. The adopters contended, *inter alia*, that the father was not a fit and proper person to care for the infant and that his opposition was in order to assert his own position and not because of paternal instinct.

The justices found that the father had always wanted the infant to remain his child, that he wished to carry out his parental duties to the infant, and that the mother had always wanted spitefully to prevent the father getting the infant, that the father had not available a home where the infant could be received immediately, and, if an adoption order were not made, it was his intention to put the infant in a nursery home where he could contribute to the infant's maintenance until such time as he could have the infant with him, and that the infant had already been in four different homes. They were of the opinion that the father's consent was unreasonably withheld and could be dispensed with, and, being satisfied that it would be for the welfare of the infant that the adoption order should be made, they granted the application.

Maude, Q.C., and Huntley for the father.

L. H. Collins for the respondents.

LORD GODDARD, C.J.: This is a Case stated by justices of the county borough of Newport, to whom an application was made under the Adoption Act, 1950, for their consent to the adoption by the first two respondents of an infant child, now aged two years, the issue of the marriage of Robert Hitchcock, who is the appellant, and Isabella Hitchcock, who is the third respondent. The case raises points of considerable importance.

[His LORDSHIP stated the facts, and continued:] Under the Adoption Act, 1950, s. 2 (4) (a), an adoption order cannot be made without the consent of both parents, if they are alive. By s. 3 (1):

"The court may dispense with any consent required by s. 2 (4) (a) of this Act if it is satisfied—(a) in the case of a parent or guardian of the infant, that he has abandoned, neglected or persistently ill-treated the infant; (b) in the case of a person liable by virtue of an order or agreement to contribute to the maintenance of the infant, that he has persistently neglected or refused so to contribute; (c) in any case, that the person whose consent is required cannot be found or is incapable of giving his consent or that his consent is unreasonably withheld."

Under r. 1 of the Adoption of Children (Summary Jurisdiction) Rules, 1949 (S.I., 1949, No. 2397), which continue in force by virtue of sched. V, para. II, to the Act of 1950, an application for an adoption order is to be made

"... by means of a statement in the form numbered 1 in sched. I to these rules, presented to the court by the applicant..."

In the statement of application (form No. 1) the applicant can request the court "on the following grounds", which then have to be set out, to dispense with the consent of anyone whose consent is required but who has not signified his consent. The statement of application is not served on any of the persons whose consent is required or on any of the other respondents. The notice which has to be served on them is form No. 3, in sched. I to the rules, which gives no information except that an application for an adoption order has been made in respect of the infant and will be heard on a certain day, and that, if the person to whom the notice is addressed does not consent to the making of the order, he is to give notice to the court before a specified day, so that a date and time may be fixed for him to attend and show cause why the order should not be made. If the parents or guardians consent, the justices can proceed to make the order, but, if consent is withheld, they have to consider the matter.

In opening this case, counsel for the father suggested that the justices did not consider any ground for dispensing with the father's consent except that set out in the statement of application. We certainly cannot take that view because we do not find anything in the Act or rules which prescribes that the adopters must set out all the grounds on which they wish to ask for the consent to be dispensed with. It is a matter for the court to decide, and other persons, viz., the local authority, or guardian ad litem appointed by the local authority, or the adoption society, can be heard, so we do not think that there is anything in that point, but I call attention to the fact, because I do not think that it is altogether without significance that the only ground which was put forward by the adopters—and I should think it is highly likely that the adoption society assist in these matters—for asking that the consent might be dispensed with was:

"... in view of the fact that the legal custody of the infant was given to ... the mother of the infant, on May 25, 1950, by an order made by the justices of the petty sessional division of Trowbridge in the county of Wilts, against which said order the [father] laid a complaint before the said magistrates on Apr. 17, 1951, who dismissed the said complaint..."

and that their decision was affirmed by ROMER, J., in the High Court. Thus the only ground on which the justices were asked to dispense with the consent was that the custody was in the mother and that the father had been refused custody both by the justices and by the learned judge. If that ground weighed with the justices in making the adoption order, it should, in my opinion, have

had the lightest weight possible, for I do not think that it is really a matter to be taken into account. In all the cases of broken homes where there are children, one parent or the other must have the custody to start with. Custody may be given by the justices, by the Divorce Court, or by the Chancery Division, or it may be given by this court if there is a habeas corpus proceeding with regard to the infant. Because one parent is given the custody of the child, it by no means follows that the other parent is never to have any rights, natural or otherwise, in the child.

An adoption order, however, is an order of the most serious description as it removes the child once and for all from his natural parents and gives him to the adopted parents as though they were and always had been his natural parents. (I am not going into questions in regard to property rights and titles, intestacy, and matters of that kind, as they are immaterial for the present purpose.) A parent who has fallen on evil days, whether by his own fault or otherwise, may still be by no means a bad father. He may be devoted to his children. If he is neglectful of them, there are plenty of proceedings by which he can be made to perform his parental duties, and the children may be placed in the care and protection of the local authority. Even then the father has some rights as a father. In the case of adoption, however, once the adoption order is made the parents can never see their child again unless by permission of the adopting parents, as, under s. 10 (1) of the Act of 1950, the adopters are solely and absolutely in charge of the child.

When there is a question of the custody or guardianship of an infant, the test which any court, whether the High Court or a court of summary jurisdiction, has to apply is the benefit of the child. It is for that reason, I think, that the justices went wrong in this case. I think that their minds have been so filled with considering what is for the benefit of the child that they have overlooked the fact that they are here making an adoption order, the effect of which is to extinguish wholly the parents' connection with the child. One of the contentions put forward before the justices on behalf of the adopters was:

"That the [father] had a grudge against society and should not have the infant as the [father] was not a fit and proper person to care for the infant, that the [father's] opposition was in order to assert his own position and not because of paternal instinct."

The findings of the justices seem to me to negative that contention wholly and absolutely. They have found that the mother refused to give to the father any information about the infant and always wanted spitefully to prevent the father getting the infant, and they might have found that she regarded the infant merely as a pawn in the dispute between herself and the father. In regard to the father, they found that he is a good worker and has always wanted the infant to remain his child and wishes to carry out his parental duties to the infant. They also found that he has not available a home where the child could be received immediately, and that, if an adoption order were not made, it was his intention to put the child in a nursery home where he could contribute to its maintenance until such time as he could have the child with him. If it is a question of guardianship or custody, the fact that one parent or the other has not at the time a home into which to put the infant is a most material factor. The mother in this case wants to get rid of the infant. The father does not. The father has not a home to which he can at once send the infant, but someone has to have the guardianship of the infant. Why, then, is it to be said that the only way of giving the infant the care and protection which he requires is to make an adoption order whereby the father, whom the justices have found to be

honest in his desire to have the infant, is to be shut out from having any parental rights in the infant?

I cannot see that there is any evidence that the father is acting unreasonably. He is in no different a position from that of a man whose wife has died or has deserted him, and who is left with young children, and is in serious difficulty to know what to do with them. He may be put in great difficulty in finding accommodation or in finding someone to look after them, especially if his wages are not very high. I have never heard that put forward as a reason why the children should be taken away from him and made someone else's children, as would happen if adoption orders were made. In my opinion, the first requisite before an adoption order can be made is the consent of the parents. If they do not consent, the order may be made, notwithstanding their refusal, for the reasons which are set out in s. 3 (1) (a) and s. 3 (1) (b) of the Act of 1950. Under s. 3 (1) (c), the order can be made if a parent is unreasonably withholding his consent, but the mere fact that the adoption will be for the benefit of the child is not an answer to the question whether a parent is unreasonably withholding his consent. I am not going to attempt to lay down what would amount to an unreasonable withholding of consent within s. 3 (1) (c), because circumstances are so various that one cannot prophesy with regard to facts which are found in some other case. In the case which is now before us, I think that, as the justices find that the father has an honest desire to remain the parent of his child, and that he is working satisfactorily so that he has money which he can contribute to the upkeep of the infant, he cannot be said to be acting unreasonably in withholding his consent, notwithstanding that he may have to put the infant into some kind of institution, although it would, naturally, be better for the infant to have the benefit of a home life, if possible, rather than to be in an institution. For these reasons, in my opinion, we ought to reverse the decision of the justices in this case.

HILBERY, J.: I agree.

DEVLIN, J.: I also agree. On the question whether "consent is unreasonably withheld", within the meaning of s. 3 (1) (c) of the Act of 1950, I think it is significant that s. 3 (1) (c) is to be contrasted with the proviso to s. 2 (3) of the Adoption of Children Act, 1926, which provided that:

"... the court may dispense with any consent required by this sub-section if satisfied that the person whose consent is to be dispensed with... is a person whose consent ought, in the opinion of the court and in all the circumstances of the case, to be dispensed with."

That proviso gave an absolute discretion to the court, and, in exercising their powers under a section so worded, the justices would, no doubt, be right in regarding the welfare of the child as the matter of paramount importance. But s. 3 (1) (c) of the Act of 1950 is worded differently. It is unnecessary to speculate on the reasons for the change. The legislature may have considered that, while the welfare of the child is in the end of paramount importance, it would be best for the child to remain with his natural parents, if one of them wanted him. However that may be, it is plain that the prescribed test is no longer the welfare of the child. Attention has been drawn by LORD GODDARD, C.J., to the nature of s. 3 (1) of the Act of 1950 and to the fact that the circumstances in which consent may be dispensed with under s. 3 (1) (a) and s. 3 (1) (b) are where a parent has, by his own act of parental misbehaviour, disqualified himself from having his refusal of consent attended to. It is in that light that one has to construe the sub-section, and, in

particular, the words "that his consent is unreasonably withheld", in s. 3 (1) (c). In my judgment, the test to be applied for the purpose of s. 3 (1) (c) is this: Is the attitude of a father, in refusing his consent, unreasonable, i.e., is the father being unreasonable as a father? If it is possible to say that a father could reasonably come to the conclusion that his child ought not to be adopted, it seems to me impossible to hold that his consent is unreasonably withheld. The welfare of the child is, of course, of indirect importance, because a father who has no regard for the welfare of his child in reaching such a decision is not reasonable, but the child's welfare is no longer the sole test. The test that has to be directly applied is an inquiry into the attitude of the father, and that, I think, was not really disputed by counsel for the respondents.

That being so, there are two questions that fall to be asked. The first and obvious one is: Is consent being refused whimsically or arbitrarily or not in good faith, because, if so, a fortiori it would be unreasonable. On that the finding of the justices is conclusive to the contrary, because they find:

"The [father] has always wanted the infant to remain his child and . . . wishes to carry out his parental duties to the infant."

Of course, it does not follow, as counsel for the father said, that a father's desire to keep his child is necessarily conclusive that his decision to do so is reasonable. He may be a dipsomaniac or otherwise quite unfitted, however much he may want to do so. But if it is shown that he wants the child and is fit to be a father and can support the child, it seems to me, *prima facie*, that it is impossible to say that a decision not to have his child adopted is unreasonable. The test is of the same sort as one would apply to the actions of a father in other similar circumstances—if, for example, a father, whose home has been broken up, refuses to board his children with relatives, the question one would ask would be: Is a father, in those circumstances, acting unreasonably?

The argument of counsel for the respondents that the father must satisfy the justices that he can provide a home for the child, either now or in the foreseeable future, is adding something which is not warranted by the Act. There may be all sorts of reasons why a father cannot provide a home for his child, either immediately or in the foreseeable future. The provision of a home might be an overriding consideration if the test were the welfare of the child, but, if the test is the reasonableness of the father, it is not enough that he is not in a position to say immediately and definitely that he can provide a home or to disclose his plans for providing one.

The *prima facie* conclusion can, of course, be displaced, but the burden of so displacing it lies on those who assert that the refusal is unreasonable. If they can bring evidence before the court which shows that the father's prospects of providing a home are quite illusory and there is no real chance of it, that would be a matter to be taken into consideration. Again, the test is the same. A father might say: "I want my child and I think I can find a home for it". But the presumption in his favour might be displaced if the justices consider this a satisfactory answer: "You want your child. but, having regard to the difficulties with which you are faced, to your past record, and to your situation, you will never be able to provide a home for him or bring him up as you ought, and you should realise, as a reasonable man, that it is in his best interests that you should part with him altogether".

I bear in mind constantly that we are dealing in this case not with the question whether we agree or disagree with the justices, but with the question whether there is any evidence on which they could reach their conclusion. They have not stated their reasons, but have merely expressed their opinion that the father's

consent is unreasonably withheld and that they should dispense with it. When one looks at the Case, however, it seems to me they have set out facts which necessarily lead to the conclusion that the father wanted his child, was fit to be a father, and could support the child. They have set out no facts which rebut the prima facie inference or show that his decision to keep the child was an unreasonable one. Therefore, this is a case in which it can properly be said that the findings of the justices are not supported by the evidence which they have set out.

I wish to emphasise that, in my judgment, this is an exceptional case, as it is one in which the justices, who were dealing with a new Act, have not applied the right test. That, I think, is the conclusion which must inevitably be drawn when one looks at the case as a whole. As my Lord has said, they have applied the broader test of the welfare of the child; on that test, their conclusion may well be right. If one examines it in the light of the test which I have propounded, I think that their conclusion falls to the ground as not being supported by any evidence. In the ordinary case, once I am satisfied that the justices have applied the right test, I should be most reluctant to go through the evidence, as it is set out in the Case, to find that the justices' decision was unjustified. It is the universal rule of these courts that an appellate court does not interfere with the findings and conclusions of the justices or judges below, who have seen and heard the witnesses. That is particularly so in a case of this sort where an impression of reasonableness or unreasonableness obtained from the demeanour of a parent may not be easily translatable into the words of a Case Stated. But, for the reasons which I have given, and satisfied, as I am, that the justices have not applied the right test according to the true construction of s. 3 (1) of the Act of 1950, I think that their decision in this case cannot be upheld.

Appeal allowed.

Solicitors : *Woodcock, Ryland & Co.*, agents for *Vicary & Knight*, Warminster (for the appellant); *David Morris*, Newport, Mon., *Withy, King & Lee*, Bath, and *Rider, Heaton, Meredith & Mills*, agents for *Sylvester & Mackett*, Trowbridge (for the respondents). F.G.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., HILBERY AND DEVLIN, JJ.)

May 27, 1952

LEICESTER v. PEARSON

Road Traffic—Pedestrian crossing—Precedence not given to foot passenger—No negligence on part of driver—Pedestrian Crossings (London) Regulations, 1951 (S.I. 1951, No. 1193), reg. 4.

The driver of a motor car was charged with failing to accord precedence to a foot-passenger at a non-controlled pedestrian crossing, contrary to reg. 4 of the Pedestrian Crossings (London) Regulations, 1951. The magistrate found that the driver was not negligent and that it was not his fault that he did not accord precedence to the foot passenger, and he dismissed the information.

HELD: that the duty imposed by reg. 4 was not absolute, but only a duty to take reasonable steps to accord precedence to the foot-passenger, and that, in view of his finding that the driver was not negligent, the magistrate was right in dismissing the information.

CASE STATED by a metropolitan magistrate.

At a court of summary jurisdiction sitting at the North London Magistrate's

Court on Dec. 14, 1951, the appellant, a sergeant of the Metropolitan Police Force, preferred an information against the respondent, that he, being the driver of a vehicle approaching a pedestrian crossing where traffic was not for the time being controlled by a police constable or a light signal, unlawfully did fail to accord precedence to a foot-passenger who was on the carriageway at the said crossing, contrary to reg. 4 and reg. 9 of the Pedestrian Crossings (London) Regulations, 1951. The magistrate, being of opinion that the respondent was exercising all due care, was keeping a proper look-out, and was driving without negligence, and that it was not his fault that he did not accord precedence to the foot-passenger in question, dismissed the information.

M. J. H. Turner for the appellant.

J. D. Stocker for the respondent.

LORD GODDARD, C.J.: I will ask **DEVLIN, J.**, to deliver the first judgment.

DEVLIN, J.: This case raises a very short point of construction of the Pedestrian Crossings (London) Regulations, 1951, reg. 4, which provides:

"Every foot-passenger on the carriageway within the limits of an uncontrolled crossing shall have precedence within those limits over any vehicle and the driver of the vehicle shall accord such precedence to the foot-passenger, if the foot-passenger is on the carriageway within those limits before the vehicle or any part thereof has come on to the carriageway within those limits."

The respondent, while driving his car, knocked down a Mrs. Cowley while she was on an uncontrolled pedestrian crossing, and he was prosecuted for having committed a breach of reg. 4.

The facts the magistrate finds, so far as they are material, are that the lighting in the neighbourhood of the said crossing was poor, it was raining, and the road surface was wet and in poor condition. He finds, by way of amplification with regard to the lighting, that the east side of the road in question is flanked by trees causing shadows on that side of the road, that on the west side light showed through the windows of shops, and that Mrs. Cowley was crossing from the darker side of the road towards the lighter side. He finds that the respondent was driving his car at a reasonable and proper speed in the prevailing circumstances, and that the respondent did not see Mrs. Cowley till she was on the crown of the road although there was no physical obstruction to interfere with his view of either Mrs. Cowley or the crossing. His conclusion was that the respondent was exercising all due care, was keeping a proper look-out, and was driving without negligence, and that the accident happened because, when he saw Mrs. Cowley, he then being seven or eight yards from the crossing, he applied his brakes and his car skidded. He found that it was not the fault of the respondent that he did not accord precedence to Mrs. Cowley at the said crossing, and he dismissed the information. Against that decision the police now appeal. It is not clear from the Case whether the magistrate thought that the accident was due to the respondent having failed to see Mrs. Cowley in time, and, therefore, having applied his brakes too late, or whether he thought it was due to the fact that, seeing Mrs. Cowley in time and applying his brakes in time, as the result of the skid he collided with Mrs. Cowley, but the fundamental finding is that there was no negligence on the part of the respondent, and, accordingly, before it is necessary to consider which of those two views was operating in the magistrate's mind, it is relevant, first, to determine whether the finding of no

negligence is by itself an answer. That depends on the construction of reg. 4.

Regulation 4 appears in terms to be absolute. It provides that every foot-passenger shall have precedence within the limits stated and that the driver of the vehicle shall accord such precedence to the foot-passenger, but there are plenty of precedents for saying that words which are expressly absolute in a statute or a statutory regulation can be construed as imposing only a qualified obligation if the context so requires. Statutes and regulations of this sort have not uncommonly been held to mean "shall use reasonable endeavours to accord such precedence". If one reflects on the consequences of imposing an absolute obligation, those consequences tend, in my judgment, to show that it could not have been the intention to impose such an obligation in this regulation. It would mean, for example, that, although the respondent had done everything that he could be required to do, including keeping a proper look-out and actually seeing the lady in good time, nevertheless, because he skidded, he committed a breach of the regulation. Similarly, as my Lord put it in the course of the argument, if, having pulled up himself, he were pushed forward by a car which struck the back of his car and propelled him into collision with the lady on the crossing, a matter that would be quite beyond his control, he would still be liable. These matters are certainly matters one ought to consider, and I do consider them, but the predominating feature in my mind is that this is not a regulation which is prohibiting particular sorts of driving. The regulation does not provide that one shall not drive in a certain manner, or that one shall not drive at more than a certain speed, or anything of that sort—a type of provision which has often been construed as imposing an absolute obligation—but it is a regulation for controlling the order of traffic and indicating who is to have precedence at certain points. Regarded as a regulation of that sort, I think it would be quite unreasonable to suppose that an absolute prohibition or an absolute obligation was intended. I think this regulation means that reasonable steps must be taken to accord precedence. Accordingly, I think the finding of the magistrate that there was no negligence is conclusive that there was no breach of the regulation. That does not mean that it would be a defence every time for a motorist to say: "I did not see the pedestrian". Far from it. The duty is to accord precedence. The duty is to give way to the pedestrian if he is on the crossing before the vehicle or any part thereof has come on to the crossing, and it would only, I imagine, be in an exceptional case that the magistrate would be able to find that a failure to see a foot-passenger was not due to some failure on the part of the driver to keep a proper look-out. I would dismiss the appeal.

HILBERY, J.: I concur. Regulation 4 does not prohibit the doing of some specific act. It imposes a duty to do something on the happening of a certain event, and, therefore, it is just such a regulation, as my Lord pointed out in *Harding v. Price* (1), as requires one to construe it as though qualifying words were written into it. The magistrate has found that there was no negligence, that the driving was at a reasonable and proper speed, and that the respondent was exercising all due care, was keeping a proper look-out, and was driving without negligence, which means that he did not fail to see this person on the crossing at the time he ought to have seen her. It means that he was not driving at a speed improper in the circumstances, and part of the circumstances was that the road was wet. The magistrate came to the conclusion in the circumstances that there was a failure effectively to accord precedence because there

was in fact a physical impact, but, having regard to his findings of fact and the clearance he gives to the respondent in respect of any allegation of negligence, it seems that he is saying in effect that, notwithstanding the exercise of every care that a man could reasonably be expected to take, there was a failure to give an effective right of precedence to the foot-passenger. What happened was inevitable or was due to some circumstance over which the driver had no reasonable or possible control, and those are circumstances which indicate that the construction we put on this regulation is essentially the right one.

LORD GODDARD, C.J.: I agree. I am conscious that the decision we have given may cause difficulties in administering the regulation, but I think it would be impossible to construe this regulation as imposing absolute liability in the sense that, come what may, be the reason what it may, an offence has been committed. I agree, therefore, with the judgments which have been delivered.

Appeal dismissed.

Solicitors: *Solicitor, Metropolitan Police* (for the appellant); *Ponsford & Devenish* (for the respondent).

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., DEVLIN AND GORMAN, JJ.)

May 23, 1952

LEACH v. EVANS

Road Traffic—Being in charge of motor vehicle while under influence of drink—Driver walking towards vehicle with intention of driving—Road Traffic Act, 1930 (20 and 21 Geo. 5, c. 43), s. 15 (1).

The respondent approached his motor van, which was standing unattended and without lights by the side of a road. When about three yards from it he told a police constable that he was looking for the van, that it was his, and that he was going home. The constable observed that the respondent was under the influence of drink and arrested him. At the police station an ignition key which fitted the van was found in the respondent's possession. The respondent was charged before the justices with being in charge of a motor vehicle on a road while under the influence of drink to such an extent as to be incapable of having proper control of the vehicle, contrary to s. 15 (1) of the Road Traffic Act, 1930, but the justices, being of opinion that there was no evidence that the respondent was in charge of the van, held that there was no case to answer and dismissed the information.

HELD: that the decision of the justices was wrong as there was evidence that the respondent was in charge of the vehicle at the material time, and that the case must be remitted to them to hear and determine.

CASE STATED by Middlesex justices.

On Nov. 19, 1951, at about 10.40 p.m., a police constable observed a motor van stationary and unattended and without lights in Great Cambridge Road, Edmonton. The respondent approached the van from the direction of a public house, staggering continually and on one occasion almost falling on his knees. When he was about three yards from the van, he told the police constable that he was looking for his van. The constable pointed to the van and asked him if it was his, and he replied: "That's it. I am going home," and started to walk towards the van. Observing that he was under the influence of drink, the

constable stopped him while he was still at a distance of about three yards from the van and arrested him on a charge of being in charge of a vehicle while under the influence of drink to such an extent as to be incapable of having proper control of the vehicle. At the police station an ignition key which fitted the van was found in his possession, and, when he was released on bail on the following morning, he drove away in the van. At a court of summary jurisdiction sitting at Tottenham on Dec. 7, 1951, he was charged on an information preferred by the appellant with having been, while in charge of a motor vehicle on a road, under the influence of drink to such an extent as to be incapable of having proper control of the vehicle, contrary to the Road Traffic Act, 1930, s. 15 (1). At the close of the case for the prosecution it was submitted on the respondent's behalf that on the facts he could not be deemed to be in charge of the van at any material time and that there was no case to answer. The justices, being of the opinion that there was no evidence that the respondent was in charge of the van, held that there was no case to answer and dismissed the information. The prosecutor appealed.

Wigoder for the appellant.

I. Percival for the respondent.

LORD GODDARD, C.J.: I cannot understand the difficulty which the justices of Middlesex, sitting at Tottenham, found in this case. Here is a van driver who comes out of a public house looking for his van when he is obviously under the influence of liquor to a very considerable extent. He tells the police officer that he is looking for his van, that the van in question is his, and that he is going home. It is said that he was not in charge of the van. If he was not, who was? The case must go back to the justices with a direction that there was evidence that he was in charge of the van. If he has any evidence to give afterwards, no doubt the justices will hear it. The appeal is allowed with costs.

DEVLIN, J.: I agree.

GORMAN, J.: I also agree.

Appeal allowed.

Solicitors: *Solicitor, Metropolitan Police* (for the appellant); *Breeze & Wyles* (for the respondent).

T.R.F.B.

COURT OF APPEAL

(SINGLETON, DENNING AND HODSON, L.J.J.)

May 19, 20, 21, 29, 1952

JONES v. MANCHESTER CORPORATION AND OTHERS

Hospital—Liability of hospital board for negligence of doctor—Contribution—Law Reform (Married Women and Tortfeasors) Act, 1935 (25 and 26 Geo. 5, c. 30), s. 6 (2).

The plaintiff's husband was employed by the first defendants as a stoker in their cleansing department. In the course of performing the duties of his employment he sustained burns on his face, as a result of which he was taken to a hospital administered by the third defendants, the Manchester Regional Hospital Board. The second defendant, who had qualified as a doctor some five months before, was a member of the medical staff at the hospital, and her duties included the administration of anaesthetics. Under the instructions of a more senior doctor, who was also employed by the hospital board, the second defendant administered gas to the patient by a mask held over the face. It then became apparent that, owing to the presence of the mask over the face, the burns could not be properly treated, and the doctors decided to cease giving gas and to administer another anaesthetic, pentothal, by means of an injection. The second defendant proceeded to administer the normal amount of pentothal which would be given to a fully conscious person, and the dose was given in two halves, with a pause between the two which was less than that recommended for the drug. As a result of the improper administration of the drug, the patient died. The plaintiff was awarded damages for negligence against the second defendant and the hospital board jointly, and the question for the Court of Appeal was in what proportions those damages should be borne as between the second defendant and the board.

HELD (HODSON, L.J., dissenting): the board was not merely vicariously liable for the negligence of its servant, but was also liable in negligence through entrusting the administration of a dangerous anaesthetic to a newly qualified doctor under the supervision of a surgeon who was himself negligent; as both the house surgeon and the hospital board were negligent, neither was entitled to an indemnity against the other; and in the circumstances, under s. 6 (2) of the Law Reform (Married Women and Tortfeasors) Act, 1935, the second defendant should contribute one-fifth, and the hospital board four-fifths, of the damages.

APPEAL by the third defendants, the Manchester Regional Hospital Board, from an order of OLIVER, J., made at Manchester Assizes and dated July 25, 1951.

The plaintiff was awarded £5 damages against the first defendants for pain and suffering sustained by the deceased, and against that award there was no appeal. Damages amounting to £1,438 3s. 3d. were awarded against the second and third defendants jointly, for negligence causing death, and the third defendants were ordered to indemnify the second defendant. The third defendants appealed.

Beney, Q.C., and *Cantley* for the third defendants.

Nelson, Q.C., and *C. T. B. Leigh* for the second defendant.

Cur. adv. vult.

May 29. The following judgments were read.

SINGLETON, L.J.: William Jones was employed by the Manchester Corporation as a stoker in their cleansing department. On Jan. 11, 1950, he was emptying a sack of paper through a hole in the floor when there came a back-draught which caused flames to shoot up through the hole. Jones was burned about the face, and he was taken to the Ancoats Hospital where his death occurred the same day. In due course an action was commenced against the Manchester Corporation by his widow, in which she claimed damages on her

own behalf and on behalf of her children, alleging negligence against the corporation. Subsequently, Dr. Olive Cynthia Wilkes and the Manchester Regional Hospital Board were added as defendants, it having become clear that the death of Jones did not occur through the burns. Dr. Wilkes was a house surgeon at the Ancoats Hospital, which is administered by the hospital board. It was claimed that she was negligent in regard to the administration of an anaesthetic, that the death of Jones was caused thereby, and that she and the hospital board were responsible in damages therefor. It is unnecessary to say more about the case against the corporation than that the plaintiff recovered £5 damages against them in respect of pain and suffering caused to Jones before his death. Both Dr. Wilkes and the hospital board denied negligence throughout. The case was heard before OLIVER, J., at Manchester Assizes on July 19 and 20, 1951, and on July 25 he gave judgment for the plaintiff against both, assessing the damages at the sum of £1,438 3s. 3d. After hearing further evidence and argument, the learned judge ordered that the whole of the damages and the plaintiff's costs should be borne by the hospital board. On Nov. 3, 1950, the hospital board's solicitor had served on Dr. Wilkes, or upon her advisers, a contribution (or indemnity) notice stated to be issued pursuant to Ord. 16A, r. 12. On July 23, 1951 (after the evidence had been given, but before judgment) Dr. Wilkes's solicitors wrote to the hospital board's solicitor saying that in the event of judgment being given against her she would claim an indemnity, or contribution, against the hospital board. This appeal relates only to the position as between Dr. Wilkes and the hospital board; the submission made on behalf of the board being that, far from the board being held responsible to indemnify Dr. Wilkes, the order ought to have been that Dr. Wilkes should indemnify the board.

It is desirable that I should say something as to the facts. When Jones arrived at the hospital he was seen by two young doctors, Dr. Sejrup, who obtained his qualifications in 1947, and Dr. Wilkes. Dr. Wilkes obtained her degrees in 1949, and had been appointed to the hospital some five months before the date of the death of Jones. On that day she was acting as anaesthetist. She had passed her examinations as surgeon and doctor, but she had no special qualifications as an anaesthetist and not much experience. As the learned judge pointed out, for many years anaesthetists have been regarded as a special branch of the profession. It is a fact that to anaesthetise a human being, to deprive him of consciousness, is to take a considerable step. If the matter is handled by experienced people very little danger exists, but to allow inexperienced people to practise that without supervision is a serious thing. The two young doctors decided to clean up the face, on which the burns were, under an anaesthetic. Jones got on to the operating table. He was in perfectly good health. He was suffering pain from his burns, but he was not in a serious condition otherwise. He got on to the operating table himself at about a quarter-past five. When he was on the table Dr. Wilkes first applied nitrous oxide gas with oxygen by means of a mask over his face. It is, perhaps, strange, and it shows the inexperience of those concerned, that they should have taken that course when the operation involved attending to his face, for it meant that the face would be covered with the mask. When it was realised that the mask would be in the way for that which Dr. Sejrup had to do, it was decided to change and to give an injection of pentothal. Pentothal is one of the barbituric group. It is dangerous—there is no question about that—and though as time has gone on it has become much more used than it was some time ago, it is still a drug which ought to be administered with great care. Dr. Wilkes sent the nurse for pentothal. She brought it. By that time Jones had been under gas for some minutes. He

was not conscious, and he could not be asked to count. One of the recognised practices when pentothal is injected into a patient is to ask the patient to count, so that it is possible to tell when the stage of complete anaesthesia is reached. The dose of pentothal which was administered by Dr. Wilkes was the ordinary dose which is given to a person who has not had any other anaesthetic—ten cubic centimetres. At the time that the injection was given the patient was not conscious. He may have been semi-conscious; he had been, according to the judge's finding, under gas for some three to five minutes. Ten cubic centimetres of pentothal was taken into the syringe, and the whole of the ten cubic centimetres was injected by Dr. Wilkes in two lots—first, approximately half the amount, then there was a pause the length of which is all-important, and then the other half of the ten cubic centimetres was injected. By the time that was completed the patient was dead.

[His LORDSHIP examined the evidence. He said that OLIVER, J., was satisfied that the death of Jones was caused through negligence in the administration of the anaesthetic. It was not quite clear on which ground, or grounds, he based his finding, but it might be that there were three at least: (a) the speed at which pentothal was administered; (b) the amount of pentothal injected, having regard to the fact that the patient had not recovered consciousness after the administration of nitrous oxide; (c) failure to watch the patient carefully during the administration of the pentothal; and he continued:] The order against which this appeal is directed is in these terms:

"And it is further ordered that the defendants Manchester Regional Hospital Board do indemnify the defendant Wilkes against all damages and costs the said defendant Wilkes is called upon to pay to the plaintiff and that in the event of the said defendant Wilkes paying to the plaintiff the said sum of £1,438 3s. 3d. and costs as aforesaid the said defendant Wilkes be at liberty to sign judgment against the said defendants Manchester Regional Hospital Board the amount of the judgment debt and costs so paid."

I think it is clear that OLIVER, J., having given judgment against both Dr. Wilkes and the hospital board, was not granting an indemnity arising from, or through, the contract between those parties, but was applying s. 6 of the Law Reform (Married Women and Tortfeasors) Act, 1935. Under sub-s. (2) the court has power to exempt any person from liability to make contribution, or to direct that the contribution shall amount to a complete indemnity.

In *Ryan v. Fildes* (1) TUCKER, J., said:

"This section makes it clear that the order as to contribution and the extent of the contribution is within the discretion of the court, because the language is 'may recover contribution'."

OLIVER, J., at the end of his judgment, said:

"So far as the application is concerned that she should contribute or that she should indemnify the board, I will not order her to contribute to the extent of a penny piece."

Under the order Dr. Wilkes is absolved from paying any part of the damages or costs recoverable by the plaintiff, or, perhaps, I should say that, if she is called on to pay, she can recover from the hospital board anything she pays.

The submission made on behalf of the hospital board is that the order is wrong, and that on the facts as found by the judge the board ought to have been granted

an indemnity against Dr. Wilkes, or, at least, that she ought to have been ordered to contribute towards the damages awarded to the plaintiff. The claim of the board is based, in the first place, on the contractual relationship between the parties, from which, it is said, there must be implied an undertaking to indemnify the board in respect of any negligence on the part of the doctor for which the board is found responsible. There was on the record a plea by which the board denied that Dr. Wilkes was their servant, or that they had any right of control over her in relation to medical treatment given by her, and, in particular, in relation to the administration of the anaesthetic. No such point was raised on the trial or in this court, and the case was argued on the basis that the relationship of master and servant existed as between the board and Dr. Wilkes. I find it difficult to deal with the claim under this head without further elucidation as to what was the contract between the parties.

In *Eastern Shipping Co. v. Quah Beng Kee* (1), LORD WRENbury said:

"A right to indemnity generally arises from contract express or implied, but it is not confined to cases of contract. A right to indemnity exists where the relation between the parties is such that either in law or in equity there is an obligation upon the one party to indemnify the other. There are, for instance, cases in which the state of circumstances is such that the law attaches a legal or equitable duty to indemnify arising from an assumed promise by a person to do that which, under the circumstances, he ought to do."

Dr. Wilkes had been qualified about five months. She was appointed after an interview. There is nothing to show what the board knew of her, except that she had obtained her medical degrees. I suppose it may be said that they were entitled to expect that she had the knowledge and skill of a newly qualified doctor, and that she would exercise that degree of skill. I think, too, that in such circumstances there must be implied an undertaking by the board that they would provide some reasonably competent person to work with her, or to guide her in case of difficulty. A newly qualified doctor cannot know much of drugs such as pentothal or of the dangers arising therefrom, and it is not reasonable, or safe, that he or she should be left without guidance or help on such matters. That was the view which OLIVER, J., took. He said:

"I think to put a weapon like a barbituric within reach of a girl who has only been qualified for five months and expect her to handle it accurately, with sufficient knowledge and experience—to watch the way a patient has to be watched—is simply asking for trouble. I cannot help it if it is common practice."

Dr. Sejrup was with her at the time of the giving of the anaesthetic. He, too, was a house surgeon at the hospital. He was senior to Dr. Wilkes, and he had been qualified just over two years. According to the evidence given by Mr. Dafforne, Dr. Sejrup was in charge of the operation, and he was a person to whom Dr. Wilkes might apply for help or instruction in case of need. It does not appear from the evidence that he had much more knowledge of the danger of the use of pentothal than had Dr. Wilkes. It was he who decided to start with the mask and nitrous oxide, a wholly unintelligible and futile proceeding which, maybe, was the originating cause of the trouble. After it was appreciated that it would be difficult to clean the patient's face when the mask was on it, a change was decided upon. "Jointly we had to turn to a drug such as pentothal, because of the mask", he said; and he gave evidence to the effect that all was

(1) [1924] A.C. 177.

done quite properly. It did not cross his mind that the administration of pentothal to a man who was substantially "doped" with another drug was an unwise thing to do. He had made a statement from which it appeared that the speed at which the injection of pentothal was given was too great, or that there was not sufficient interval between the two shots of it. I am unable to see that there is any difference between the responsibility of Dr. Sejrup and of Dr. Wilkes. It was the hand of the latter by which the drug was administered, but they were both together, and both had agreed upon a course of action. Dr. Sejrup was the senior, and he was a servant of the hospital board. So far as we know, neither of these young doctors had been given any instruction as to the danger of using pentothal when a patient was still partly unconscious from the use of nitrous oxide, or of the great need for careful watching in such a case. OLIVER, J., considered that blame attached to the hospital by reason of the system or lack of system. I cannot help feeling that Dr. Sejrup displayed a lack of care or was wanting in knowledge, and he was acting as casualty officer on the day in question. I realise that he is not a party to the proceedings, and that there was no allegation against him on the pleadings, but he gave evidence and the court is entitled to consider the answers he gave on the issue between Dr. Wilkes and the hospital board. He was a servant of the board.

The case of the plaintiff in the action was based upon negligence in the administration of the anaesthetic. On the judge's finding both Dr. Wilkes and the hospital board were liable in damages to the plaintiff. It may well be that in the ordinary simple case a servant must indemnify his master against his wrongful acts for which the master is made liable. A chauffeur who, through negligence, causes damage for which his employer is held responsible may well be liable to his master. On the other hand, if the chauffeur is young and inexperienced, and is suddenly told to drive another and bigger car, or lorry, which he does not understand, and an accident follows, it is by no means certain that the employer would be entitled to an indemnity.

On the facts of the present case it cannot be said that the death of Mr. Jones was solely caused by negligence on the part of Dr. Wilkes, though that was the basis of the claim against the board. There were other contributory causes on the part of the board or of their servants. The judge was not bound to accept the evidence of Dr. Evans that it was not unreasonable to expect one of Dr. Wilkes's experience to carry out the duties put upon her. Dr. Evans, indeed, at the end of his evidence said that a very hard task was put upon her.

In SALMOND ON THE LAW OF TORTS, 10th ed., at p. 78, I find this passage:

"It would seem clear on principle that in all cases of true vicarious liability the person held vicariously liable for the tort of another should have a right of indemnity as against that other. Thus, a master who has paid for the negligence of his servant should be able to sue that servant for indemnity. That this is generally so cannot be doubted, but in *Ryan v. Fildes* (1) TUCKER, J., was prepared to believe that there might be cases in which it was not."

The employer cannot have a right of indemnity if he himself has contributed to the damage or if he bears some part of the responsibility therefor, and the same reasoning applies if some other and senior employee's negligence has contributed to the damage. On the facts of this case I feel bound to reject the claim of the hospital board to an indemnity against Dr. Wilkes. I mentioned in the course of the argument the desirability of pleadings and of discovery if a question such as this was to be raised. Without this it is not easy to determine

(1) [1938] 3 All E.R. 517.

the true terms of the contract between the parties. All that we know is that Dr. Wilkes was appointed a house surgeon at the hospital a short time after she had been qualified, and after an interview. There is no evidence to show that she was ever instructed, or advised, at the hospital as to the use of drugs.

The next question for consideration is whether the learned judge was right in ordering that Dr. Wilkes was entitled to a contribution from the hospital board which was equivalent to a complete indemnity. TUCKER, J., in *Ryan v. Fildes* (1), spoke of this as within the discretion of the court. And, indeed, this court has set its face against interference with the proportion of responsibility determined by the judge of first instance. The circumstances are, however, somewhat unusual. The action was based on negligence on the part of Dr. Wilkes, and it was only on the finding of negligence against her that the action could succeed against the board and against her. None the less, the judge, in determining the measure of responsibility as between her and the board, was entitled to take into consideration all the relevant matters proved before him. If he had accepted the evidence of Dr. Wilkes he might have been justified in deciding as he did, but he did not accept her evidence. Her case—and it was supported by the hospital board—was that she was not negligent, and that she had followed the recognised practice. The findings of the judge seem to me to show that she did not take the usual time over the anaesthetic, or allow a pause of the length of time which she knew was necessary, and, further, that she did not observe the patient with the care that she should have used, difficult though it may have been in view of his condition. In those respects she was not following that which she had been taught. When these matters are looked upon, it is impossible to say that Dr. Wilkes has no share in the responsibility for the damage, or that her share is only nominal. It seems to me that the judge did not pay sufficient attention to his findings against Dr. Wilkes, and that it would not be right for this court to say that the whole of the responsibility falls upon the hospital board. I do not consider that this is a case in which either party is entitled to an indemnity against the other. I regard it as one proper for the application of s. 6 of the Act of 1935, and I would say that on the facts the proportion of responsibility for the damage should be held to be twenty per cent. on Dr. Wilkes and eighty per cent. on the hospital board. The appeal should be allowed to that extent.

DENNING, L.J.: On Jan. 11, 1950, William Jones was burned on the face. He was taken to the Ancoats Hospital in Manchester, where he was accepted for treatment. By accepting him for treatment, the hospital authorities became under a duty to use reasonable care and skill in their treatment of him. They could not, and did not, themselves perform this duty. They entrusted it to a house surgeon, Dr. Sejrup, who had been qualified for two years, and to a house physician, Dr. Wilkes, who had been qualified for five months. These two did not perform the duty properly, with the result that the patient died.

[His LORDSHIP stated the facts and continued:] At the outset it is important to notice the state of the pleadings. In the statement of claim it was alleged that Dr. Wilkes herself was negligent and that the hospital authorities were responsible for her negligence because she was acting as their servant, but it was not alleged that anyone else was negligent, nor that the hospital authorities were negligent themselves. In answer to that claim it would be no defence for Dr. Wilkes or the hospital authorities to say that she had not sufficient experience to undertake the task, or to say that the surgeon in charge was also to blame. The patient was entitled to receive all the care and skill which a fully qualified and well-experienced anaesthetist would possess and use. If Dr. Wilkes failed to

exercise that care and skill, she would be liable to the patient or his widow for the consequences, no matter that the hospital authorities knew that she had not sufficient experience for the task and were much to blame for asking her to do it without proper supervision. If the hospital authorities were to blame in that respect, it would be no answer to the widow's claim, but it might be very relevant in their claim over against Dr. Wilkes. There were, however, unfortunately, no pleadings on this question of indemnity or contribution. The parties dispensed with them. The court has, therefore, to deal with all the issues to which the proved facts give rise.

The first issue is whether the hospital authorities are in law entitled as of right to an indemnity from Dr. Wilkes. The hospital authorities contend that, in English law, if a master is made liable for the negligence of his servant, he is entitled to indemnity from that servant. I know that has often been assumed to be the law: see SALMOND ON TORTS, 7th ed., p. 105, and the Report of the Law Revision Committee, 1934, Cmd. 4637, p. 7. But I know of no case in which it has been actually decided. In the absence of express stipulation, I cannot see any contractual basis for such an indemnity. A servant promises, no doubt, to do his duty to his master to the best of his ability, but he does not promise to indemnify him against liability to third persons, and I see no reason why any such promise should be implied. The master's claim against the servant, if it exists at all, must, I think, be based, not on a promise of indemnity, but in damages for breach of contract. The servant, it can be said, promises to do his work with reasonable care, and if he fails to do so, with the result that the master is made liable to a third person, the master can recover the amount as damages. That is how it was put by WARRINGTON, L.J., in *Weld-Blundell v. Stephens* (1), but the difficulty about that way of putting it is that, although the servant is alone negligent, nevertheless in the eye of the law the master and the servant are both tortfeasors. They are, indeed, joint tortfeasors: see per SCRUTTON, L.J., in *The Koursk* (2). This is shown by the fact that they could, even in the old days, be sued jointly for the one cause of action: *Stephens v. Elwall* (3), per LORD ELLENBOROUGH, C.J. If the plaintiff only sued one of them and obtained judgment, it was a bar to an action against the other: *Wright v. London General Omnibus Co.* (4). As they were joint tortfeasors, it followed at common law that, if one of them was made to pay, he could not claim contribution or indemnity from the other, for there could be no contribution between joint wrongdoers: *Merryweather v. Nixan* (5). There were, of course, some exceptions to that rule, but, so far as I know, no exception was ever introduced to allow a master to claim contribution or indemnity from his servant.

The true position is, I think, illumined by the parallel case of an independent contractor. When the principal is made responsible for breach of duty, owing to the default of the independent contractor, the principal has a right of indemnity if he has expressly stipulated for it in the contract: see *Dalton v. Angus* (6); *Hughes v. Percival* (7) per LORD BLACKBURN. But in the absence of express stipulation he has no right of indemnity at common law, but only a right to contribution under the statute. The reason is because the principal is a

(1) [1919] 1 K.B. 520; *affd.* H.L. [1920] A.C. 956.

(2) [1924] P. 140.

(3) (1815), 4 M. & S. 259.

(4) (1877), 41 J.P. 486; 2 Q.B.D. 271.

(5) (1799), 8 Term Rep. 186.

(6) (1881), 46 J.P. 132; 6 App. Cas. 740.

(7) (1883), 47 J.P. 772; 8 App. Cas. 443.

tortfeasor jointly with the independent contractor: *Daniel v. Rickett, Cockerell & Co., Ltd. & Raymond* (1); *Wilkinson v. Rea, Ltd.* (2). It is true that in those cases the principal himself is under a duty of care which he cannot get rid of by delegating it to an independent contractor, but that is also the position in most cases of master and servant. It is certainly the position in these hospital cases. The hospital authorities are under a duty of care and skill to the patient which they cannot escape by delegating it to a doctor on the staff: *Cassidy v. Ministry of Health* (3). The result is that at common law, even if the negligence is only that of one doctor alone, nevertheless the hospital authorities are joint tortfeasors with him and cannot at common law claim contribution or indemnity from him. Their claim can only rest under the Law Reform (Married Women and Tortfeasors) Act, 1935. It is significant that there is only one case in the books where a master has recovered indemnity from a servant, and he did not then recover at common law, but only under the Act of 1935. That was *Ryan v. Fildes* (4), where TUCKER, J., said that it was a matter for the discretion of the court, and he pointedly observed that there might be cases where

"the court would not think it right to make an order, either for contribution or indemnity, as between a master and his servant."

That is, I think, the true position. In the absence of an express contract on the matter, the master has no right at law to an indemnity or contribution from his servant. It is entirely a matter for the discretion of the court under the Act of 1935 whether it should order any, and, if so, what, contribution or indemnity between them.

Such is the position when one particular servant alone is negligent. All the more so when the hospital authorities themselves, or other members of the staff, are also negligent. The hospital authorities cannot come down on every negligent member of the staff for a full indemnity. Such a course could only be justified if the hospital authorities could be regarded as innocent parties who have been made vicariously liable without any fault in them. But the law does not regard them as innocent. It says that they are themselves under a duty of care and skill, and, if that duty is not fulfilled, it regards them as tortfeasors and makes them liable as such, no matter whether the negligence be their personal negligence or the negligence of their staff.

In all these cases the important thing to remember is that when a master employs a servant to do something for him, he is responsible for the servant's conduct as if it were his own. If the servant commits a tort in the course of his employment, then the master is a tortfeasor as well as the servant. The master is never treated as an innocent party. This is well seen by taking a simple case where two cars are damaged in a collision by the fault of both drivers. One is driven by a servant, the other by an owner-driver. The owner-driver can obviously only recover a proportion of the damage to his own car from the owner of the other one, and likewise the owner of the chauffeur-driven car can only recover a proportion of the damage to his car. He cannot recover the whole damage from the owner-driver. He cannot claim as if he was an innocent person damaged by the negligence of the two drivers. He can only claim upon the footing that he himself is a tortfeasor and that the damage is partly the result of his own fault within the Law Reform (Contributory Negligence) Act, 1945.

(1) [1938] 2 All E.R. 631; [1938] 2 K.B. 322.

(2) [1941] 2 All E.R. 50; [1941] 1 K.B. 688.

(3) [1951] 1 All E.R. 574.

(4) [1938] 3 All E.R. 517.

Now suppose that a third person was injured in the collision, so that the owners of both cars are liable in tort to the injured person for his full damages. The owner of the chauffeur-driven car obviously cannot recover a full indemnity from his servant or from the owner-driver. He cannot claim as if he were an innocent person who has suffered damage as the result of the negligence of the two drivers. He can only claim as a tortfeasor for contribution under the Act of 1935.

My conclusion, therefore, is that the hospital authorities in this case were themselves tortfeasors who have no right to indemnity or contribution from any member of their staff except in so far as the court thinks it just and equitable, having regard to the extent of that person's responsibility for the damage. In considering what is just and equitable, I think the court can have regard to extenuating circumstances which would not be available as against the injured person. Errors due to inexperience or lack of supervision are no defence as against the injured person, but they are available to reduce the amount of contribution which the hospital authorities can demand. It would be in the highest degree unjust that hospital authorities, by getting inexperienced doctors to perform their duties for them, without adequate supervision, should be able to throw all the responsibility on to those doctors as if they were fully experienced practitioners. Applying this principle to the present case, I find it very difficult to place much blame on Dr. Wilkes. She was not in charge of the operation. Dr. Sejrup was. Moreover, he was, in his own words, "responsible for the administering of anaesthetics." He decided to use nitrous oxide. That was the first mistake, or, at any rate, the cause of all the trouble. Then they decided together to use pentothal. If that needed special care and skill, he was the one who should have told her what was necessary, because he was, according to the general superintendent, one of the doctors available for her to consult. She administered the pentothal under his eyes and to his entire approval. In these circumstances it seems to me that her share in the responsibility is much less than his. But the responsibility of the hospital authorities is, I think, more than that of either of them. It is obvious that mistakes of this kind should not occur. They should so run their hospital that they do not occur. They should not leave patients in inexperienced hands without proper supervision. The judge took a strong view about this. I am very reluctant to interfere with his decision, but there is one matter which does affect my mind. It is this. Counsel for Dr. Wilkes admitted to us that she was negligent to a degree which was inexcusable even in an inexperienced person. He admitted that, in injecting the pentothal, she must be taken to have allowed only ten seconds between the first five cubic centimetres and the second five, whereas she knew she ought to have allowed thirty seconds. In view of this admission, I agree with my Lord that she should bear some share of the responsibility, and that it should be put at one fifth. I agree, therefore, that the appeal should be allowed to that extent. In leaving the case I cannot help remarking that at one time masters used to insure their servants against liability. This case shows that we are approaching a time when servants will have to insure their masters.

HODSON, L.J. [after stating the facts]: The case was contested throughout on the issue, aye or no: Was Dr. Wilkes negligent in the administering of an anaesthetic?, and the board supported her on this issue. On Nov. 3, 1950, the board delivered a notice under Ord. 16A, r. 12, to Dr. Wilkes claiming, in the event of their being found liable to the plaintiff: (1) a contribution or indemnity under s. 6 of the Law Reform (Married Women and Tortfeasors) Act, 1935; (2) damages

for breach of contract in such sums as the plaintiff might recover against the board. The claim in contract was put as follows:

"In the capacity of house surgeon at Ancoats Hospital you were at all material times the servant agent or officer of the defendants Manchester Regional Hospital Board and under duty to them by reason of your contract with or your relationship to them to exercise reasonable skill and care in and about all acts done by you in such capacity, and you were in breach of such duty in the respects alleged against you in the amended statement of claim and by reason of such breach have caused damage to the said board in such sums (if any) as the said board may be found liable to pay to the plaintiff by way of damages or costs in this action."

After the evidence had been given, but before judgment, the doctor gave notice that she would ask for an indemnity from the board. By consent, no pleadings were ordered upon either of the notices. The board contends that the learned judge was in error, having found that the death was caused by the negligence of Dr. Wilkes, in ordering the board as her employers to indemnify her, and further contends that relief should be given to the board itself in the terms of its own notice. The contract between the board and Dr. Wilkes was not in dispute. She was employed as house surgeon and physician at the Ancoats Hospital as from July 23, 1949. She was fully qualified as a bachelor of medicine and surgery, and her training included the administration of anaesthetics, including pentothal. Part of her duty was to administer anaesthetics when required in the casualty department of the hospital. If occasion arose in the event of a casualty serious enough to require a more experienced anaesthetist, she had the power to call in a senior anaesthetist. This was the only qualification of this part of her duty. She had given anaesthetics on about a hundred occasions, including about twenty occasions when she used pentothal. She had been in the service of the board five or six months when the fatality occurred.

The whole case made by the plaintiff, supported by the defendant corporation and contested by Dr. Wilkes and her employers, was that she had been negligent in giving the anaesthetic. No separate allegation was made against the board as to itself, Dr. Sejrup, or any other servant. The learned judge decided the case on the issues raised and contested before him by making an explicit finding of negligence against Dr. Wilkes. [His LORDSHIP referred to the evidence]. Taking into account that a judge is, in a proper case, entitled to reject uncontradicted evidence, particularly that which may be described as opinion evidence, I cannot agree that the learned judge was right in attributing negligence to the board. The operation was comparatively simple and there was nothing apparent in the condition of the patient to call for exceptional measures to be taken. In the circumstances, there was, in my opinion, no evidence to justify a finding that a qualified doctor such as Dr. Wilkes should not be entrusted with the use of an anaesthetic of a kind which is in regular use without the supervision of a specialist or more experienced practitioner.

A subsidiary point was raised in this court which was not mentioned in the court below, namely, that Dr. Sejrup, the operating surgeon, had the opportunity of preventing Dr. Wilkes from giving the pentothal in excessive quantity or at so great a speed and neglected to do so, so that his negligence should be attributed to the board. No charge of negligence having been made against him at any time, I do not think that the finding of negligence against the board, which was never pleaded, can be supported by finding an act of negligence against another servant of the board, such act also not having been pleaded in answer to the notice given, or at all.

In my judgment, the contractual position of Dr. Wilkes vis-à-vis the board is clearly established by the evidence. The legal position is stated in the judgment of WILLES, J., in *Harmer v. Cornelius* (1):

"When a skilled labourer, artisan or artist is employed, there is on his part an implied warranty that he is of skill reasonably competent to the task he undertakes—*spondes peritiam artis*. Thus, if an apothecary, a watchmaker or an attorney be employed for reward, they each impliedly undertake to possess and exercise reasonable skill in their several arts. The public profession of an art is a representation and undertaking to all the world that the professor possesses the requisite ability and skill. An express promise or express representation in the particular case is not necessary."

In *Weld-Blundell v. Stephens* (2), WARRINGTON, L.J., said in the course of his judgment:

"... it may well be that if a servant by his negligent act inflicts an injury on a third person who recovers damages therefor from the master, the latter may recover the amount from the servant in an action against him for breach of his duty. But in such a case the right of action against the master and his legal liability themselves result from the servant's negligent act, and but for that act would not have existed."

In the present case, in my judgment, proof of an express provision to exercise reasonable skill is unnecessary. The breach of duty to exercise reasonable skill and care alleged in the notice given under Ord. 16 has been proved, and the board is, in my opinion, entitled to the relief asked for by the notice given under Ord. 16A, r. 12, because the damages which the board may have to pay flow directly from Dr. Wilkes's breach of contract. There is, in my opinion, no room for the operation of the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6, and no question arises as to the modification of the common law position by the provisions of that section. I would, therefore, allow the appeal to the full extent on the ground that the defendant, Dr. Wilkes, is in breach of a term necessarily implied in her contract of employment by the board.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *P. W. H. Revington*, Manchester (for the third defendants); *Le Brasseur & Oakley* (for the second defendants).

C.N.B.

(1) (1858), 22 J.P. 724; 5 C.B.N.S. 236.

(2) [1919] 1 K.B. 520; *affd.* H.L. [1920] A.C. 956.

COURT OF APPEAL

(SOMERVELL, BIRKETT AND HODSON, L.JJ.)

June 10, 1952

RAILWAY EXECUTIVE v. WOKING URBAN DISTRICT COUNCIL
AND ANOTHER

Railway—Rating—Railway hereditament—Mansion used as residential staff training college—Premises "occupied as a dwelling-house"—Local Government Act, 1948 (11 & 12 Geo. 6, c. 36), s. 86 (1), proviso.

The Railway Executive were occupiers of a mansion which they used as a residential staff training college for their employees. The premises were used partly for instructional purposes (admittedly non-rateable), partly as living accommodation for students, with servants' and housekeeper's quarters, and partly as a common room for students. Employees were selected to attend courses not only for training and instruction, but to see how they acted in circumstances as near as possible those of normal social intercourse, and for this purpose students were required to eat and sleep on the premises. Courses lasted from one to four weeks.

HELD: although residence at the college was part of the training course, the premises, other than the instructional part, were "occupied as a dwelling-house" within the proviso to s. 86 (1) of the Local Government Act, 1948, and therefore, they did not form part of a railway hereditament and were assessable to rates.

Railway Assessment Authority v. Great Western Ry. Co. (1947) (112 J.P. 88), applied.

CASE STATED by the Lands Tribunal under s. 3 (4) of the Lands Tribunal Act, 1949, and R.S.C., Ord. 58B, r. 1.

The Railway Executive, to which the functions of the British Transport Commission under s. 2 (2) (b) of the Transport Act, 1947, were delegated by a scheme of delegation pursuant to s. 5 (4) of the Act, appealed to the Lands Tribunal against a decision of a local valuation court who determined that an assessment should be made in the valuation list for the urban district of Woking in respect of a hereditament established by the executive as a residential staff training college, at a gross value of £320 and a rateable value of £263. The executive had made a proposal for the alteration of the valuation list by deleting therefrom the assessment of £400 gross value and £330 rateable value in respect of the college on the ground that the premises were a railway hereditament and were occupied for "non-rateable purposes" as defined in s. 86 (2) of the Local Government Act, 1948. The local valuation court decided that with the exception of the accommodation used solely or primarily for instructional purposes the premises were occupied as a dwelling-house, and were, therefore, assessable. For the executive it was contended that the premises were occupied for the purposes of staff training; that their employees who attended courses only slept there so that they did not interrupt their training by going home every night and so that they could be under observation; that the position differed from *Railway Assessment Authority v. Great Western Ry. Co.* (1) in that there was no element of permanent residence and that the employees only came to the premises for the purpose of attending courses, and did not use the premises even as a temporary home. The respondents, the rating authority and the valuation officer, contended that the residence of the students was the essence of the staff training scheme; the conditions of residence were as nearly as possible those to be normally found in a private dwelling-house; and that, therefore, the premises were occupied as a dwelling-house. The tribunal dismissed the

(1) 112 J.P. 88; [1947] 2 All E.R. 794; [1948] A.C. 234.

appeal and confirmed the assessment. The Railway Executive appealed.

Roue, Q.C., and *Squibb* for the Railway Executive.

Sir Arthur Comyns Carr, Q.C., and *Maurice Lyell* for the rating authority and valuation officer.

SOMERVELL, L.J.: This is an appeal by way of Case Stated from an award made by the Lands Tribunal for the decision of this court pursuant to s. 3 (4) of the Lands Tribunal Act, 1949, and R.S.C., Ord. 58b, r. 1. It turns on the construction and application of provisions in the Local Government Act, 1948. The question is what part of certain premises are under those provisions not to be rated because they come within the category of a railway hereditament and what part fall to be rated in the ordinary way as being occupied as a dwelling-house.

The sections with which we are concerned are s. 85, s. 86 and s. 87 contained in Part V of the Act of 1948. The general effect of s. 85 is that a railway or canal hereditament is not to be liable to be rated, but a contribution has to be made by those undertakings in lieu of rates. This case turns on s. 86 (1), which provides:

"In this Part of this Act, except where the contrary is expressly provided, the expression 'railway or canal hereditament' means a hereditament occupied for any of the purposes of the British Transport Commission specified in sub-s. (2) of this section: Provided that no premises occupied as a dwelling-house, hotel or place of public refreshment, or so let out as to be capable of separate assessment, shall be deemed to be, or to form part of, a railway or canal hereditament".

Section 87 (1) provides:

"Where a railway or canal hereditament is occupied partly for non-rateable purposes and partly for other purposes—(a) the hereditament shall not, by virtue of the preceding provisions of this Part of this Act, be exempt from liability to be rated and from inclusion in any valuation list or in any rate; but (b) there shall be ascribed to the hereditament such net annual value as may be just having regard to the extent to which it is occupied for those other purposes; and (c) the deductions, if any, to be made from the net annual value in arriving at the rateable value shall be calculated with regard only to those other purposes."

Although s. 86 (1) refers to the British Transport Commission, it is common ground that the Railway Executive are a proper party to these proceedings having regard to powers of delegation to that body which have been exercised by the Transport Commission.

The premises in question have been used as what is described as a residential staff training college, consisting of a mansion house and outbuildings. Paragraph 5 (3) of the Case reads as follows:

"The accommodation afforded by the premises is used partly for instructional purposes, partly as living accommodation for students with servants and housekeeper's quarters, partly as a common room for students, and partly as a self-contained flat for the principal, and the gross value of £400 appearing in the valuation list in respect of the premises prior to the decision of the local valuation court is attributable to the various parts thereof in the following proportions: Part used for instructional purposes, £80. Students' living accommodation, servants' and housekeeper's quarters, £250. Common room, £20. Principal's accommodation, £50".

It is common ground that the part used for instructional purposes is occupied for non-rateable purposes as defined in s. 86 (2) of the Act of 1948, and that the principal's accommodation was occupied as a dwelling-house within the meaning of the proviso to s. 86 (1) of that Act. The controversy, therefore, turns on the students' living accommodation, servants' and housekeeper's quarters and common room. The local valuation court, proceeding on the basis that this part of the premises was rateable, made an assessment in respect of it. The arguments on behalf of the Railway Executive that it should not be treated as occupied as a dwelling-house, are mainly based on the finding in para. 5 (4), of the Case which reads:

"The Railway Executive select certain of their employees to attend courses at this college for the purpose not only of giving them training and instruction, but also of assessing the quality of the selected employees and seeing how they react in circumstances as near as possible those of normal social intercourse as well as gauging their technical ability. For this purpose it was essential that those attending the courses should have recreation, eat and sleep on the premises. The courses last from one to four weeks. If a course extends over a week the students are allowed to go home for the week-end. The college was opened in 1947 and approximately 1,450 railway employees have attended the courses there. Except during a holiday period of one month in each year, the premises are continuously occupied by the staff and students attending courses."

The award then sets out the rival contentions of the parties and the learned president says:

"The question I asked myself was whether the living accommodation for the students, the servants and the housekeeper and the common room were premises occupied as a dwelling-house within the meaning of the proviso to s. 86 (1) of the Local Government Act, 1948. On the facts proved I came to the conclusion that the Railway Executive required the students who came to the college to reside there, to feed and sleep there and to do those things which justify the hereditament being described as a building occupied as a dwelling-house, and I was further of the opinion that there was no distinction in principle between the case of *Railway Assessment Authority v. Great Western Ry. Co.* (1) and this case. I, therefore, answered the question in the affirmative."

He dismissed the appeal and affirmed the assessment which had been directed by the local valuation court.

In *Railway Assessment Authority v. Great Western Ry. Co.* (1) a railway company provided at one of its junctions, in the vicinity of which normal lodging-house accommodation was inadequate, a hostel erected for the exclusive use of employees temporarily working there away from their homes. Furnished cubicles, which the occupant could lock, were available at a charge of 1s. a night for over two hundred and fifty men, and employees often resided there for substantial periods. There were recreation rooms, baths and lavatories and a canteen which was open also to non-resident employees. It was held that the premises were occupied by the railway company, through the occupants of the cubicles, as a dwelling-house, and so should be excluded from the railway valuation roll under s. 1 (3) of the Railways (Valuation for Rating) Act, 1930, which was similar to the provision which we have to construe. The main speech, with which the other noble and learned Lords agreed, was given by LORD THAKERTON, who, in stating the facts said (112 J.P. 90):

(1) 112 J.P. 88 ; [1947] 2 All E.R. 794 ; [1948] A.C. 234.

"These premises came to be built as a result of the great increase during the war in the traffic handled at Didcot Junction, and the consequent increase in the footplate, locomotive and traffic department staffs, coupled with the shortage of local lodging accommodation. It was essential that sleeping and canteen accommodation should be available for the company's servants who were away from their home stations . . ."

He then considered the time the men spent there, which on the average was longer than the men on the courses in the present case though the members of the domestic staff here may well spend a longer time than anybody did in the Didcot hostel. LORD THANKERTON, speaking of the premises said (*ibid.*, 91):

"The reason for their provision is two-fold, viz., (a) that the members of the staff who use the cubicles are away from their homes and cannot dwell at home, and (b) that sufficient lodging-house accommodation is not available at Didcot. While they are at their work, these members of the staff, in my opinion, may properly be said to dwell or reside in the hostel or to inhabit the hostel. That most of them so dwell or reside for substantial periods is shown by the figures to which I have referred, and they use these premises in substitution for their home dwelling-houses, which are not available while they are on duty."

He concludes by saying (*ibid.*, 93):

"I am, therefore, unable to find any justification for attaching to the words 'premises occupied as a dwelling-house' a meaning other than their ordinary meaning, as to which I have already stated my views. . ."

Applying that canon of construction, he decided that the hostel there was a dwelling-house. If one assimilates completely attendance at these courses for a week or a month with working at Didcot Station, it would seem to me plain that the *Great Western Ry. Co.* case (1) covers the present matter. I find it impossible to draw any distinction based on the difference in the average period of residence. But counsel for the Railway Executive submits that there is a difference, and that that difference should lead us to allow this appeal. The difference, he says, is that in the *Great Western Rly. Co.* case (1) the hostel was a substitute for the ordinary home. I have no doubt if one of the employees could have got a house in Didcot he would have been free to occupy it. It was, as it were, a temporary substitute home where he could not bring his family, but where he had his own room. Here the men are required to reside in these premises because seeing them in the conditions in which they live at the college is part of the training course. Counsel submits first—and here I am inclined to agree with him—that the words "occupied as a dwelling-house" are the same as if the words were "occupied for the purposes of a dwelling-house", and that "as" is used in that sense in s. 86 (2). Assuming that one can so construe it, counsel submits that we must come to the conclusion that the real purpose of the residence was not that of accommodation as a dwelling-house, but that of accommodation for a training course. I will give an example which will, I think, illustrate what I feel is the fallacy in that process of reasoning. A man might be ordered by his doctor to take a house at the seaside, because unless he did so his health would suffer and he might ultimately become seriously ill and die. His purpose, therefore, in taking that house is for the preservation of his health, but it would be idle to say that he was not occupying it as a dwelling-house. It seems to me that the part of the mansion with which we are concerned was none the less occupied as a dwelling-house because that occupation, so far as the students

(1) 112 J.P. 88 ; [1947] 2 All E.R. 794 ; [1948] A.C. 234.

were concerned, was to enable the staff to assess their quality and suitability for promotion, apart from their technical ability which could, no doubt, be decided without such observation. I, therefore, have come to the conclusion that the learned president of the tribunal was right in the conclusion to which he came and that the award should be upheld.

BIRKETT, L.J. : I am of the same opinion. I think the decision of the House of Lords in *Railway Assessment Authority v. Great Western Ry. Co.* (1) is conclusive of this case. It is quite true that the facts in the case are different from the facts with which we are here concerned. In the *Great Western Ry. Co.* case (1) the living accommodation was built expressly for the people living there who were engaged on the railway company's work. It was virtually a home away from home. In the present case the difference is that the Railway Executive selected certain of their employees to attend courses at this particular college for the purpose, not only of giving them training and instruction, but also assessing the quality of the employees and

"...seeing how they reacted in circumstances as near as possible those of normal social intercourse as well as gauging their technical ability. For this purpose it was essential that those attending the courses should have recreation, eat and sleep on the premises."

Despite that difference between the *Great Western Ry. Co.* case (1) and the present case, nevertheless the essential question for consideration was the same, the construction of the words "occupied as a dwelling-house". In the *Great Western Ry. Co.* case (1) LORD THANKERTON said (112 J.P. 91):

"There remains the important question whether these premises are 'occupied as a dwelling-house' within the meaning of [s. 1 (3) of the Act of 1930]. These words 'occupied as a dwelling-house' must be taken as being used in their ordinary meaning unless the context shows an intention to use them in a different meaning."

Previously he had said (*ibid.*, 90):

"...the only question in this appeal is whether these premises are occupied as a dwelling-house or a hotel."

Here, on the agreed facts, the principal and the staff live on these premises more or less all the year round except for the ordinary period of vacation, and a selected body of students come down for a week, a fortnight, three weeks, or a month, it may be, to live there as part of the training which it is desired they shall undergo. It seems to me, as my Lord has already said, that living at Didcot has been held by the House of Lords to be an occupation of a dwelling-house. There cannot be any difference between that case and this case when the real question at issue is fairly stated. I, therefore, am of opinion that this appeal ought to be dismissed.

HODSON, L.J. : I agree and have nothing to add.

Appeal dismissed.

Solicitors : *M. H. B. Gilmour* (for the Railway Executive) ; *Solicitor of Inland Revenue* (for the respondents).

G.F.L.B.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., DEVLIN AND GORMAN, JJ.)

May 22, June 10

NATIONAL ASSISTANCE BOARD (by J. R. Beattie) v. WILKINSON

Husband and Wife—Maintenance—Desertion by wife—Grant to wife of national assistance—Liability of husband to National Assistance Board—National Assistance Act, 1948 (11 and 12 Geo. 6, c. 29), s. 42 (1) (a).

A wife without justification refused to live with her husband in the matrimonial home provided by him. Later, she obtained a grant of assistance from the National Assistance Board, and the board preferred complaints against the husband to recover sums already paid by them to the wife and for an order that the husband should thenceforth pay such sum in respect of the wife's maintenance as the court might order. The justices held that under s. 42 (1) of the National Assistance Act, 1948, the husband was not liable to maintain a wife who had deserted him, and dismissed the complaints. The board appealed.

HELD: that s. 42 (1) of the Act of 1948 did not alter the previously existing law so as to impose on the husband an absolute liability to maintain his wife, and that, as the wife had deserted the husband, the justices had rightly held that he was not liable to maintain her or to pay the amounts claimed by the board.

CASE STATED by justices for the county of Durham.

At a court of summary jurisdiction sitting at Bishop Auckland two complaints were preferred by the National Assistance Board by J. R. Beattie, their officer (the appellant), against the respondent under the National Assistance Act, 1948. The complaints alleged that the respondent was the husband of one Edith Wilkinson, whom he was liable to maintain under s. 42 (1) of the National Assistance Act, 1948, and who had been given assistance by the board amounting to £26 18s. between Apr. 30, 1951, and Oct. 22, 1951, under Part II of the Act and was continuing to be given assistance at the rate of £1 4s. 6d. a week. The appellant applied for summonses to be served on the respondent calling on him to show cause why orders should not be made on him to repay the sum of £26 18s., and to pay such sum, weekly or otherwise, as the court might consider appropriate.

The complaints were heard on Nov. 29, 1951, when the following facts were proved or admitted. The respondent was married to his wife on Mar. 16, 1949, and by agreement the parties set up the matrimonial home in the house of the wife's mother. A child of the marriage was born in December, 1949. On or about Jan. 7, 1951, the respondent left the matrimonial home to live with his parents. Until Feb. 23, 1951, he paid his wife the weekly sum of £2 by way of maintenance of herself and the child and thereafter the sum of 15s. in respect of the maintenance of the child only. The wife was unable to earn money herself owing to the state of her mother's health and the need to look after the child. As a result of correspondence between the solicitors of the parties the respondent found two rooms which would become vacant in about eight weeks, and he invited his wife to join him there, but after inspection of them she refused to do so. The rooms were still available at the time of the hearing of the complaints, but the wife maintained her refusal. The respondent was earning between £7 and £8 a week and had no unusual expenses which would prevent him from making a proper payment to the wife or the board.

For the respondent it was contended that s. 43 (2) of the National Assistance Act, 1948, directed the court to have regard to all the circumstances, that this included the wife's conduct, and that she had deserted the respondent and he was no longer liable to maintain her. For the appellant it was contended that

for the purposes of the National Assistance Act, 1948, a husband was at all times liable to maintain his wife, that the board were entitled to obtain orders against the respondent under s. 43 (2) of the Act even if the wife could not obtain an order for maintenance against him under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, and that s. 43 (2) did not permit the board to disregard his absolute liability to maintain his wife to the extent of the assistance which had been or would be granted to her.

The justices held that the wife was unreasonable in refusing to go and live with the respondent and was deserting him, that the liability under s. 42 (1) of the National Assistance Act, 1948, was not absolute, and that the wording of s. 43 (2) enabled them to have regard to the conduct of the wife. They held that the respondent was not liable to maintain the wife under s. 42 (1) and dismissed the complaints. The board, through their officer, appealed.

J. P. Ashworth for the appellant.

Sheen for the respondent.

Cur. adv. vult.

June 10. The following judgments were read.

LORD GODDARD, C.J., stated the facts and continued: The contention of the board was that s. 42 (1) of the National Assistance Act, 1948, imposes an absolute obligation on a husband to maintain his wife, and that, if assistance is given to her by the board, they have a right to apply for an order against him on the ground that his liability exists notwithstanding that his wife may unreasonably refuse to live in a home which he has provided or may even have deserted him for such length of time as would entitle him to apply for a divorce or even if she has committed adultery—in short that, so long as the marriage exists and has not been dissolved, the husband can have no answer to the claim.

Section 42 (1) of the National Assistance Act, 1948, is in these terms:

“For the purposes of this Act—(a) a man shall be liable to maintain his wife and his children, and (b) a woman shall be liable to maintain her husband and her children.”

Section 43 provides that:

“(1) Where assistance is given or applied for by reference to the requirements of any person (in this section referred to as a person assisted), the board or the local authority concerned may make a complaint to the court against any other person who for the purposes of this Act is liable to maintain the person assisted. (2) On a complaint under this section the court shall have regard to all the circumstances and in particular to the resources of the defendant, and may order the defendant to pay such sum, weekly or otherwise, as the court may consider appropriate.”

The justices, having found that the wife was in a state of deserting her husband, were of opinion that the liability under s. 42 (1) was not absolute and that the wording of s. 43 (2) enabled them to have regard to the conduct of the wife, and, being of opinion that the husband was not liable to maintain his wife under s. 42 (1), dismissed the complaints.

Before dealing specifically with the contentions advanced on behalf of the appellant, it is necessary briefly to state the course of legislation which has led to the right of authorities giving poor relief to recover from a husband some amount for the maintenance of his wife. The Act which established the poor law is the well known Poor Relief Act, 1601, by s. 7 of which it was provided:

“and . . . the father and grandfather, and the mother and grandmother, and the children of every poor . . . person . . . being of a sufficient

ability, shall, at their own charges, relieve and maintain every such poor person in that manner, and according to that rate, as by the justices of peace of that county where such sufficient persons dwell, or the greater number of them, at their general quarter sessions shall be assessed; upon pain that every one of them shall forfeit 20s. for every month which they shall fail therein."

It will be observed that a husband is not mentioned in the section, no doubt for the reason that a husband was and is by common law bound to maintain his wife and the remedy of a wife at common law if her husband failed to maintain her was to pledge his credit. The obligation of the other relatives to maintain members of the family which is imposed in the section is to be enforced by a penalty but there was no provision for the overseers to recover the cost of any relief which they might give. By the Vagrancy Act, 1824, s. 3, a person who wilfully refused or neglected to maintain his family was liable to be dealt with as an idle and disorderly person and was punished by imprisonment and on a second offence could be dealt with as a rogue and vagabond and thereafter as an incorrigible rogue and became liable to the penalties imposed by the statute. In 1834 boards of guardians were established by the Poor Law Amendment Act of that year and the whole administration of the poor law was reformed and from that time forward unions were established and the administration of the poor law was placed under boards of guardians.

The first Act which enabled the cost of the maintenance of a wife to be recovered from a husband by an order of the court was the Poor Law Amendment Act, 1850. That Act dealt only with the recovery of the cost of maintenance of a lunatic married woman maintained in an asylum or registered hospital and who had thereby become chargeable to the union. By s. 5 the guardians could obtain an order on the husband to pay such sum weekly or otherwise towards the maintenance of the lunatic as after a consideration of all the circumstances should appear to the justices to be proper. A considerable addition to the law was made by the Poor Law Amendment Act, 1868, which by s. 33 provided that, when a married woman required relief without her husband, the guardians of the union or the overseers of the parish to which she became chargeable might apply to the justices to require the husband to show cause why an order should not be made on him to maintain his wife and the justices, after a consideration of all the circumstances of the case, could make such order as they thought proper. And so the matter remained until the passing of the Poor Law Act, 1927, which, as its title shows, was an Act to consolidate the enactments relating to the relief of the poor. By s. 41 (1) of that Act it was provided that:

"It shall be the duty of the father, grandfather, mother, grandmother, husband or child, of a poor . . . person . . . if possessed of sufficient means, to relieve and maintain such person."

and this is the first time that the obligation of a husband appeared in a statute. The reason would seem to be that, as the Act was a consolidating Act and as the immediately succeeding sections deal with the liability of the husband to have an order made against him for the maintenance of his wife, it was thought right to include him in the section dealing with the liability to relieve and maintain relatives, for there was never any doubt that, so far as a wife was concerned, a husband always had been liable at common law, though, as is well known, a father was under no civil liability apart from the poor law to maintain his children. True, if he failed to do so, he would become amenable to the criminal law, but a child never had the right to pledge the father's credit

as the wife could her husband's, and there is no doubt that, anomalous as it may seem, a father is not by the civil law liable for a child's maintenance. The whole of the Act of 1927 was repealed by the Poor Law Act, 1930. The sections to which I have referred were repeated in that Act in exactly the same terms and no change was made in this position by reason of the repeal and re-enactment.

Now, there can be no doubt that neither by the common law nor by the poor law was a husband ever liable to maintain an adulterous wife or a wife who refused to live with him in the matrimonial home which he had provided, at least unless she had good cause for so refusing. The distinction between adultery and desertion was that an adulterous wife forfeited all rights of maintenance while a deserting wife's right to maintenance was only suspended. In *Rex v. Flintan* (1) LITTLEDALE, J., said with regard to an adulterous wife:

"Having rendered herself unworthy of her husband's protection, she returns to the same state as if she were not married."

and:

"If the husband is not obliged to answer for the wife's contracts, or to receive her into his house, it cannot be said that he is 'legally bound to maintain her'."

That case was quoted in *Culley v. Charman* (2) where it was held that a husband was not liable to have an order made against him under the Poor Law Amendment Act, 1868, to maintain a wife with whom he ceased to cohabit in consequence of her adultery. The difference between the position of an adulterous wife and one who refused without justification to live with her husband was pointed out in *Jones v. Newtown & Llanidloes Union* (3), where it was stated that the husband's obligation was only suspended as long as she continued wilfully to absent herself. During that time it was quite clear that he was not bound to maintain her and he could not be ordered to do so.

It is said that the National Assistance Act, 1948, has entirely altered the law on this subject and that a husband is liable to an order being made against him to maintain his wife whether she be guilty of adultery or desertion, provided only that she becomes in need of assistance and obtains it from the board. Counsel for the appellant did not shrink from the position that it would follow that, if a woman left her husband to live in adultery and the man with whom she was living and continuing to live fell out of work, so that she had to seek support from the board, her husband would still be liable to maintain her unless and until he ceased to be her husband by a decree of divorce. This would, indeed, be a remarkable result, and it is difficult to believe that Parliament could have had any such intention. It is said that this construction is unavoidable by reason of the section being prefaced by the words "for the purposes of this Act", but it may be presumed that the legislature does not intend to make a substantial alteration in the law beyond what it expressly declares. In *Minet v. Leman* (4) SIR JOHN ROMILLY, M.R., stated as a principle of construction which could not be disputed that:

"... the general words of the Act are not to be so construed as to alter the previous policy of the law, unless no sense or meaning can be applied to those words consistently with the intention of preserving the existing policy untouched ..."

(1) (1830), 1 B. & Ad. 227, 230, 231.

(2) (1881), 45 J.P. 768; 7 Q.B.D. 89, 90.

(3) 84 J.P. 237; [1920] 3 K.B. 381.

(4) (1855), 19 J.P. 499; 20 Beav. 269, 278.

In my opinion, it is perfectly possible to give an intelligent meaning to s. 42 (1), while bearing in mind to the full the prefatory words, without construing it in such a manner as would make a husband liable, for the first time in the history of the law, to maintain a wife who was either living in adultery or refusing to live in the home which he had provided and where he was willing to receive her, and indeed would equally compel a wife to maintain a husband from whom she had been obliged to depart by reason of his brutality, or who might himself be living in open adultery with another woman. It is impossible to suppose that Parliament intended this section to have any such effect. In my opinion, it was inserted for the purpose of limiting the class of persons who were liable to maintain a family. The obligation of children to maintain their parents has disappeared, the obligation by grandparents or to grandparents has disappeared. From the passing of the Act husband and wife have to support each other and have to support their children, but it is not necessary to hold that this section takes away from either spouse the defences which have always been open to them against a claim, whether arising out of the common law or the poor law statutes, and, in my opinion, a husband is no more liable since the Act of 1948 to support an adulterous or deserting wife than he was before.

Before parting with this branch of the case I ought to refer to *Aldritt v. Aldritt* (1) in which a Divisional Court of the Probate, Divorce and Admiralty Division consisting of the President and HAVERS, J., gave judgment on June 12, 1951. It may be that it was some expression of opinion in that case that induced the National Assistance Board to bring the present proceedings. That was a case in which a wife applied, under the provisions of the Summary Jurisdiction (Married Women) Act, 1895, s. 4, for a maintenance order against her husband on the ground of wilful neglect to provide reasonable maintenance. The justices had made an order on him, and, in allowing the appeal, the court pointed out that there had been a consensual separation, and that, as the husband had not been proved to have either expressly or impliedly agreed to maintain the wife notwithstanding the separation, she could not obtain an order. The court were following a previous decision of *Baker v. Baker* (2). It is true that both members of the court in giving their judgments did express an opinion indicating that, if proceedings were taken by the National Assistance Board against the husband, he might have no answer to it, and, indeed, HAVERS, J., is reported as saying:

"Under the National Assistance Act, 1948, for the purposes of that Act, a man appears to be under an absolute liability to maintain his wife and children, and a woman seems to be exactly in the same position in regard to her husband and her children."

How far the point which now falls for the express decision of this court was argued in that case does not appear, but it seems clear, at any rate, that the court did not review the poor law legislation as we have been obliged to do to decide the matter now before us. We may, therefore, say with all respect that any expression of opinion to which they gave effect was obiter, and they certainly did not decide that the National Assistance Board were entitled in all the circumstances to recover from the husband the relief they had given to his wife without regard to the circumstances which had led to his not supporting her.

This is enough to dispose of the case, but I should certainly also agree with the justices that among the considerations which they were entitled to regard

(1) Unrep. June 12, 1951.

(2) (1949), 66 (Pt. I) T.L.R. 81.

was that the husband was always ready in this case to provide a home for his wife, and that it was open to them, therefore, to consider that no payment was appropriate in such a case, but I should regret having to decide the case entirely on that ground, because that might put an adulterous wife in a better position than a deserting wife. As I have already said, a deserting wife's right is only suspended, and if she returns to her husband her right of support revives. An adulterous wife has no right to return to her husband, and so, if this court had to give effect to the decision of the board, it would seem to follow that the justices could not consider her conduct in this respect while in the case of a deserting wife they could consider the fact that the husband was willing to receive her home. For these reasons I am of opinion that the justices came to a correct decision in point of law and I would dismiss the appeal, and would like to express my appreciation of the careful and sensible way in which the justices dealt with the matter.

DEVLIN, J.: I agree. It is a well-established principle of construction that a statute is not to be taken as effecting a fundamental alteration in the general law unless it uses words that point unmistakably to that conclusion. Accordingly, if the words "a man shall be liable to maintain his wife" in s. 42 (1) (a) of the National Assistance Act, 1948, stood by themselves, I should read them subject to the common law, and should not conclude that they were intended to disturb the principle that a wife forfeited her right to maintenance by the commission of a matrimonial offence. Against this it is argued that the initial phrase "for the purposes of this Act" makes it possible to give the wide words that follow their full meaning without altering the general law. The same sort of wide words were, however, used in the Poor Law Act, 1927, s. 41 (1), which provided that it should be the duty of the husband of a poor person to maintain her. These words were not subject to any limitation to the purposes of the Act, and they were, moreover, contained in a consolidating Act. I could not, therefore, hold that the Act of 1927 altered the common law, and it is noteworthy that no one has in twenty years ever suggested that it did, but, if words of this sort are not to be widely and literally construed in 1927, why should they in 1948? The qualifying phrase "for the purposes of this Act" is not, in my judgment, sufficient to effect the alteration. The use of the phrase is sufficiently explained by the inclusion in the section of a novel liability in the case of women, and by a wish to avoid the consequences, as demonstrated in *Middlesex County Council v. Nathan* (1), of the unrestricted words in the Act of 1927. It is another principle of statutory construction that the court leans against an interpretation which produces unjust and arbitrary consequences. I think it would be unjust if a husband were compelled to support a wife in open and admitted adultery, and it would be arbitrary if the amount of money he had to spend on her depended on the speed with which he was able to obtain his decree absolute.

GORMAN, J. (read by DEVLIN, J.): I agree, and would merely add that I am quite unable to accept the contention that the effect of the words "for the purposes of this Act" in s. 42 (1) of the National Assistance Act, 1948, is to make it possible to give to the words following their full and wide meaning without altering the general law.

Appeal dismissed.

Solicitors: Solicitor, Ministry of National Insurance and National Assistance Board (for the appellant); Field, Roscoe & Co., agents for Dowling & Hewitt, Bishop Auckland (for the respondent).

T.R.F.B.

(1) 101 J.P. 441; [1937] 3 All E.R. 283; [1937] 2 K.B. 272.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., DEVLIN AND GORMAN, JJ.)

May 23, June 10, 1952

HEWITT v. HEWITT

Husband and Wife—Maintenance—Enforcement of order—Wife residing with husband at time of order—Departure of husband before three months had elapsed—Resumption of residence by husband, but not of cohabitation—Summary Jurisdiction (Separation and Maintenance) Act, 1925 (15 and 16 Geo. 5, c. 51), s. 1 (4).

At a court of summary jurisdiction on Nov. 30, 1951, a complaint was preferred by a wife in respect of arrears alleged to be due under a maintenance order previously made by the justices against her husband. The original order was made on May 26, 1950, and it was varied on Nov. 17, 1950, the weekly amount payable being then increased. At the date of the original order the parties were residing in a house of which they were the joint owners, and they continued to live there till a day in June, 1950. The husband then left the house and lived at another address till October, 1950. He then returned to the house, where his wife was still living, and they continued to live there up to the date of the complaint. From the date of his return to the date of the complaint the parties occupied separate rooms, the wife performed no domestic duties for the husband, and there was no resumption of cohabitation. The justices, being of opinion that the case was distinguishable from *Evans v. Evans* (1947) (112 J.P. 23), held that the complaint was proved and made an order accordingly. The husband appealed.

Held: that under s. 1 (4) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, so long as the parties continued to reside together the order did not take effect, but it became effective once they parted, and, once the order had become effective, it remained in force unless the state of affairs visualised by s. 2 (2) of the Act—namely, a resumption of cohabitation—took place or the order was terminated by the justices on some recognised ground, e.g., adultery by the wife. In the present case the order became effective as soon as the husband left the house in June, 1950, and, there having been no resumption of cohabitation, it was effective at the date of the complaint. The decision of the justices was, therefore, right and the appeal must be dismissed.

CASE STATED by Warwickshire justices.

At a court of summary jurisdiction sitting at Coventry a complaint was preferred by the respondent, the wife of the appellant, under the Summary Jurisdiction (Married Women) Act, 1895, that her husband had not made to her payments totalling £15 in accordance with an order of the same court made on May 26, 1950, as varied by an order of Nov. 17, 1950.

The complaint was heard on Nov. 30, 1951, when the following facts were proved. On May 26, 1950, on a complaint by the wife that the husband had been guilty of wilful neglect to provide reasonable maintenance for her and her two infant children, an order was made under the Summary Jurisdiction (Married Women) Act, 1895, s. 5, as amended by the Married Women (Maintenance) Act, 1949, s. 1, by a court of summary jurisdiction sitting at Coventry, that the custody of the children of the marriage, while under the age of sixteen years, should be committed to the wife and that the husband should pay to the wife, through the collector of the court, the sum of £2 weekly together with a weekly sum of 10s. for the maintenance of each child. On Nov. 17, 1950, the order was varied by an order increasing the weekly sum payable in respect of the older child to £1. At the date of the making of the original order both the husband and the wife resided in a house at 113, Meadow Road, Nunts Park, Exhall, which had been purchased by them previously and conveyed to them as joint owners. After the order they separately paid their shares of mortgage payments to a building society in respect of the purchase. They continued to

live in the house until June, 1950, when the husband left to live at an address in Coventry. In October, 1950, the husband returned to the house at Meadow Road where the wife had continuously resided meanwhile and both resided in the house until Nov. 30, 1951, when the complaint was heard. After May 26, 1950, the husband and wife, while residing in the house together, occupied separate rooms, and the wife performed no domestic duties for the husband, and at no time since that date had they cohabited. The arrears of £15 had accrued in respect of a period during which they had both resided in the house. The justices inquired into the husband's means and were of opinion that his refusal was due to wilful default or culpable neglect.

For the husband it was contended that by reason of the provisions of s. 1 (4) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, the order of May 26, 1950, was not enforceable, and no liability under it accrued during the period in which the £15 became payable because the wife resided with the husband during the whole of that period. The wife denied that she had resided with the husband, and contended, alternatively, that, as she had resided apart from her husband from June to October, 1950, the order would cease to have effect only if there were a resumption of cohabitation and not if they merely resided together for three months; that s. 1 (4) of the Act of 1925 applied only where residence together for three months followed immediately on the making of the order; and that under s. 2 (2) the order continued to be enforceable unless there was a resumption of cohabitation.

The justices held that, as the parties were not living apart at the date of the order, the order was not enforceable merely because the cohabitation required to bring the case within s. 2 (2) of the Act of 1925 had not taken place: *Thomas v. Thomas* (1) distinguished; but that, as the husband after a period of absence had returned to the residence which the parties jointly owned, the case was distinguishable from *Evans v. Evans* (2); and there was evidence on which they could find that the wife was not residing with the husband, and they so found. They, therefore, ordered the husband to pay the £15 or in default to be imprisoned for thirty-one days. The husband appealed.

A. M. Wallace for the husband.

N. R. King for the wife.

Cur. adv. vult.

June 10. The following judgments were read.

LORD GODDARD, C.J., stated the facts and continued: Under s. 1 (1) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, a wife was given the right to apply for an order of maintenance on the grounds mentioned in the section although she had not at the time of making the complaint left her husband, and by sub-s. (4) of the same section it is provided that the order shall not be enforceable and no liability shall accrue under it while the married woman resides with her husband and that the order shall cease to have effect if for a period of three months after it is made the married woman continues to reside with her husband. Then by s. 2 (2), it was provided that, where a married woman resumed cohabitation with her husband after living apart from him, the order should cease to have effect on the resumption of such cohabitation. In *Evans v. Evans* (2) this court decided that "resides with" meant "living in the same house with", and that judgment was re-affirmed by this court in *Wheatley v. Wheatley* (3), but in *Thomas v. Thomas* (1) the court distinguished

(1) 112 J.P. 346; [1948] 2 All E.R. 100; [1948] 2 K.B. 300.

(2) 112 J.P. 23; [1947] 2 All E.R. 656; [1948] 1 K.B. 175.

(3) 113 J.P. 459; [1949] 2 All E.R. 428; [1950] 1 K.B. 39.

Evans v. Evans (1) and held that where the parties were living apart when the order was made and afterwards came to live in the same house the provisions of s. 2 (2) applied and that the order which had become effective was not ended unless cohabitation was resumed. In giving judgment in that case, and having regard to the facts there found, I said:

" . . . the words of the Act seem to me clearly to show that, if the parties are living apart when the order is made, it is not residence, but cohabitation, that will put an end to the order . . . when the judgments in *Evans v. Evans* (1) are read carefully, it will be seen that the court visualised that there might arise the very case which has arisen here, and we pointed out the difference between the residence which was sufficient to prevent the order taking effect under s. 1 (4) and the resumption of cohabitation which was required to put an end to an order which had taken effect because the parties were living apart."

In *Thomas v. Thomas* (2) the parties came to live in the same house under an arrangement whereby the wife was admitted to the house as a tenant, or, at any rate, as something in the nature of a tenant, and under an agreement which had been sanctioned by the justices whereby the husband was allowed to diminish the payment which they had ordered by a sum of 10s. a week which the wife had agreed to pay as rent for the rooms she occupied.

It is argued in the present case that, as there was no such arrangement as there was in *Thomas v. Thomas* (2), the decision in *Evans v. Evans* (1) applies, and it was argued that *Thomas v. Thomas* (2) depended entirely on the fact that the parties were living apart when the order was made, but, in my opinion, that is not the true distinction. Section 1 (4) appears to me clearly to visualise the case of an order being made while the parties are living together and to provide that, so long as they continue to live together, the order is not to take effect, and if that state of affairs lasts for three months the order ceases to have effect. In other words, the parties are given that period in which to make arrangements for living apart. Once they part the order becomes effective, and if the order does become effective it must remain in force unless the state of affairs visualised by s. 2 (2), namely, the resumption of cohabitation, takes effect, or unless the justices put an end to the order, as they can do on the application of a husband if, for instance, the wife commits adultery, as provided by s. 7 of the Summary Jurisdiction (Married Women) Act, 1895.

In my opinion, the order of the justices came into force as soon as the husband left the house in June, 1950, and, as there has never been a resumption of cohabitation, the order still remains in force. I regard s. 1 (4) as dealing with the period following the making of the order. The order never becomes effective while the residence existing at the time when the order was made continues, and, if that state of affairs lasts for three months, the order comes to an end. But once the order has become effective, as it does when the spouses separate, it requires a resumption of cohabitation or an order of the justices to put an end to it. I desire, however, to reserve my opinion as to what the position would be if a wife left her husband's house before the three months had elapsed and then returned in circumstances showing that there was not a genuine break in the residence but merely one for the purpose of endeavouring to make the order effective. This court has already pointed out that the difficulties which arise with regard to these matters are very largely due to the present shortage of houses, which makes it very difficult in many cases for the spouses to find separate

(1) 112 J.P. 23; [1947] 2 All E.R. 656; [1948] 1 K.B. 175.

(2) 112 J.P. 346; [1948] 2 All E.R. 100; [1948] 2 K.B. 300.

accommodation, a state of affairs which did not exist when the Act was passed. It is not a satisfactory state of affairs and the position which arises under the Act of 1925 is eminently one which might be considered by the Royal Commission on Divorce which is now sitting, with a view to the attention of the legislature being called to the difficulties which arise. In my opinion, the justices came to a perfectly proper decision in this case, and, as we intimated at the conclusion of the argument, the appeal is dismissed.

DEVLIN, J.: The presumed object of s. 1 (4) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, has been several times stated by this court and cannot be in doubt. Parliament intended to relieve a wife of the necessity of having to leave home without knowing what support she could count on. It followed that she must be given a reasonable time (which Parliament considered to be three months) after she got her order within which to arrange for another dwelling. The corollary to that was that she should not enforce her order until she left home. Otherwise she might get the benefit both of the joint establishment and of the means to maintain another one. I should not myself doubt, even without the authority of *Evans v. Evans* (1), that, in the provision that the order should not be enforced while the wife "resides with" the husband, the choice of a wider expression than "cohabit" was deliberate. It was not intended that the wife should obtain the benefit of the order merely by ceasing to live with her husband as his wife. She must forgo the order for so long as she stayed under his roof.

Parliament is gifted with no greater prevision than the ordinary man. It could not, in 1925, foresee the time when it would be quite common for an injured wife to continue to live permanently in her husband's house, for the simple reason that she had nowhere else to go, and when the separated parties would make two dwelling-places out of the same structure. That was the situation that confronted this court for the first time in *Evans v. Evans* (1) and has been before the justices in varying forms ever since. In such a situation this court is not free, as Parliament would be, to make such provision as is best fitted to the changed circumstances. It has to apply the language of the Act. This court, therefore, found itself compelled to hold that, notwithstanding the change in conditions, the wife was residing with her husband within the meaning of the Act. It might have taken the same view as DENNING, L.J., did in *Hopes v. Hopes* (2) that, while there was residence at the husband's house, it was not residence *with* him. But it did not, and *Evans v. Evans* (1), affirmed by this court in *Wheatley v. Wheatley* (3), is the basis so far as any other Divisional Court is concerned for the construction of s. 1 (4).

We are now faced with a case in which the wife, if she does not reside in the same house as her husband, will not only have to find somewhere else to live, but may lose to some extent the benefit of her joint ownership of the matrimonial home. As in *Evans v. Evans* (1), we are free to do justice only through the channel of an Act of Parliament. If the Act unexpectedly creates injustice, it is for Parliament to remove it and not for us. It is this consideration, and this only, which has caused me to hesitate a little before agreeing with the solution propounded by the Lord Chief Justice. When s. 1 (4) is dealing with the enforceability of the order, it uses the word "reside". When it is dealing with the cessation of the order, it uses the words "continues to reside". It may seem at first sight an unwarranted modification of s. 1 (4) to read it as if it said "continues

(1) 112 J.P. 23; [1947] 2 All E.R. 656; [1948] 1 K.B. 175.

(2) 113 J.P. 10; [1948] 2 All E.R. 920; [1949] P. 227.

(3) 113 J.P. 459; [1949] 2 All E.R. 428; [1950] 1 K.B. 39.

to reside " in both places. Given its literal meaning, it may be argued, s. 1 (4) fits in happily with s. 2 (2) to produce a piece of intelligible and workable machinery. So construed together, the sections provide for suspension of the order during residence at any time, and for its destruction in two events—resumption of cohabitation and extension of residence for three months after the making of the order. But this, I think, is a superficial interpretation which makes sense of the words and almost nonsense of the enactment. It is clear in the first place that the period of three months' residence must be immediately after the making of the order. LORD GODDARD, C.J., so said in *Thomas v. Thomas* (1). The word " continues " points inevitably to that conclusion, and pre-supposes the wife to be in residence at the time of the order. Now, one could understand Parliament thinking that, while residence simpliciter should merely suspend, residence for a continuous period should destroy, but I can think of no reason for attributing different results to the same length of residence according to whether it occurred initially or at some subsequent time. Why should three months initially destroy, and three months later (or, indeed, six or twelve months or indefinite residence later) merely suspend? The only sensible answer, I think, is that the section does not contemplate different periods of residence. It contemplates only one period, and that is the initial one. That fits in perfectly with the presumed object of the section as I have stated it above. There is, indeed, no meaning in any period of three months except as a period of transition after the making of the order. The change in phraseology from " resides " to " continues to reside " would not appear significant to someone who never thought of the residence as being other than continuous. That was the position in 1925. No one would then have contemplated the likelihood of a wife, who had got her order and had ceased to reside with her husband, returning to his home without also resuming cohabitation.

There is nothing in this reasoning which clashes with the reasoning in *Evans v. Evans* (2). The nature of the residence referred to in s. 1 (4) is one thing and is defined by *Evans v. Evans* (2). The period of residence covered by the section is another thing, and, whatever view is taken of the nature of the residence, does not affect the period. But it must be recognised, I think, that this decision and *Evans v. Evans* (2) do not between them make of s. 1 (4) a coherent and logical piece of legislation. The ill-advised wife who lets the three months run out will lose her order. The wife who leaves her husband's roof for long enough to break the residence may return and keep her order. Thus *Evans v. Evans* (2) may be a trap for the unwary. I think the decision in that case is best regarded as an outgrowth from certain words of the Act rather than as a manifestation of the meaning of the Act as a whole. Since Parliament alone can amend its words, the decision must stand until Parliament finds time to review it. But until that happens it can stand by itself.

On the facts of this case it is not disputed that the residence was broken by the husband's departure and that the initial period of residence was under three months. It is unnecessary, therefore, to consider what acts are sufficient to break the period of residence. The residence that satisfies the test in *Evans v. Evans* (2) can be purely physical and can exist although the wish and intention of the parties is to live as far as possible apart. It may be that a physical change of residence, however short, and even if accompanied by an intention to resume the old residence at a later date, is enough to break the period. On this point I reserve my opinion. I agree that the decision of the justices should be upheld. I must add, in deference to one of the points stated in their opinion, that I cannot

(1) 112 J.P. 346; [1948] 2 All E.R. 100; [1948] 2 K.B. 300.
 (2) 112 J.P. 23; [1947] 2 All E.R. 656; [1948] 1 K.B. 175.

regard the joint ownership of the house as a ground for distinguishing *Evans v. Evans* (1). It seems to me to strengthen rather than weaken the case of residence with the husband.

GORMAN, J.: I agree that the decision of the justices must be upheld. I, too, am clearly of the opinion that s. 1 (4) of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, visualises that the period of three months' residence must be that period after the making of the order, and that the order ceases to have effect if the parties continue to reside together beyond such period of three months. In this case, the parties ceased to reside together, by reason of the husband's departure, before the expiry of the period of three months after the making of the order, and nothing has happened subsequently to put an end to the order. I desire, too, to reserve my opinion as to what would be the legal effect if the break in the "residence" by one spouse within the before-mentioned period of three months was merely for the purpose of bringing the order into effect, and was not a genuine break in the residence.

Appeal dismissed.

Solicitors: *Callingham, Griffith & Bate*, agents for *Varley, Hibbs & Co.*, Coventry (for the husband); *Julius White & Bywaters*, agents for *Penman, Johnson & Ewins*, Coventry (for the wife).

T.R.F.B.

(1) 112 J.P. 23; [1947] 2 All E.R. 656; [1948] 1 K.B. 175

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., SLADE AND PARKER, JJ.)

June 12, 1952

STEVENS v. DICKSON AND ANOTHER

Intoxicating Liquor—Drunk on licensed premises—Room of licensed premises let to private party for wedding—Guests subsequently found drunk in room—Licensing Act, 1872 (35 and 36 Vict., c. 94), s. 12.

An upper room of a public house was let to a private party for a wedding reception, and alcoholic liquor was supplied. Later, two of the guests were found drunk in the room and were charged with being drunk on licensed premises, contrary to s. 12 of the Licensing Act, 1872. Justices held that the hirer had exclusive possession of the room, that there was no possession in the licensee, and that, therefore, the room ceased to be licensed premises, and, accordingly, they dismissed the informations.

HELD: that the licence had been granted and was in force in respect of the whole of the premises, and the room in which the reception was held remained part of the licensed premises. The justices, therefore, came to a wrong decision, and the case must be remitted to them to hear and determine.

CASE STATED by Middlesex justices.

At a court of summary jurisdiction sitting at Tottenham on Jan. 11, 1952, informations were preferred by the appellant, William Stevens, an inspector of police, charging the respondents, Walter Dickson and Sidney Beattie, with having, on Dec. 8, 1951, been found drunk on licensed premises at the Northern Star public house, High Road, New Southgate, N.11, contrary to s. 12 of the Licensing Act, 1872. It was proved or admitted that on Dec. 8, 1951, a wedding

reception was held in an upper room forming part of the public house which room was hired for the purpose from 2.30 to 10.30 p.m. A special order of exemption under the Licensing Acts, 1910 and 1921, was granted in respect of the premises for the occasion from 2.30 to 5.30 p.m., the permitted hours under the Licensing Acts being from 11.30 a.m. to 2.30 p.m. and from 5.30 to 10.30 p.m. Alcoholic liquor was supplied to the members of the party in the room, and at about 8.15 p.m. the respondents, who were guests, were found drunk there.

The appellant contended that the alcoholic liquor was served in the upper room by virtue of the licence and the room was, therefore, part of the licensed premises. The respondents contended that there was no case to answer as, by reason of the private hiring, the upper room was not licensed. The justices held that, the special order of exemption having expired, the normal justices' licence and the normal licensing hours were in force at the material time; that, the upper room having been privately hired for the reception, the public had no right of access thereto; that the hiring party had exclusive possession and there was no possession in the licensee; and that, therefore, the room ceased to be licensed premises. They dismissed the information, and the appellant appealed.

F. H. Lawton for the appellant.

The respondents did not appear.

LORD GODDARD, C.J., stated the facts and continued: The justices were wrong because [see s. 110 of the Licensing (Consolidation) Act, 1910] the expression "licensed premises" means

"premises in respect of which a justices' licence has been granted and is in force."

A licence is granted in respect of the whole of the premises. The justices seem to have thought that it mattered that the wedding party had been given the exclusive use of the upstairs room, but that room was part of the premises, and there is no ground for saying that the respondents were lodgers. Even if they were, they were found drunk during the time at which the premises were open for ordinary purposes. It may be that when the case goes back to the justices, as it must, they will not think that it is a serious matter. The position is not the same as if the respondents were charged with having been drunk in the bar. However that may be, the cases must go back to the justices with an intimation that they must be heard.

SLADE, J.: I agree.

PARKER, J.: I agree.

Case remitted.

Solicitor: Solicitor for the Metropolitan Police (for the appellant).

T.R.F.B.

COURT OF APPEAL

(SOMERVELL, BIRKETT AND HODSON, L.JJ.)

June 11, 1952

ASTON CHARITIES TRUST, LTD. v. STEPNEY BOROUGH COUNCIL

Compulsory Purchase—Compensation—"Land devoted to a purpose of such a nature that there is no general demand . . . for land for that purpose"—*"Reinstatement in some other place"*—*Acquisition of Land (Assessment of Compensation) Act, 1919* (9 and 10 Geo. 5, c. 57), s. 2, r. (5)—*Town and Country Planning Act, 1944* (7 and 8 Geo. 5, c. 47), s. 57 (1).

The claimant, a private limited company which was formed to administer a charitable trust, owned premises in Stepney which until 1940 it used as a Unitarian church and for religious and charitable activities connected therewith. After 1940, owing to war damage and to the departure from the neighbourhood of part of the local population in whose interest the trust was administered, a portion of the premises remained unused. In 1942 the organ was removed from the part of the premises used as a church, which was on the first floor, and was stored in one of the rooms on the ground floor, and a company agreed to take a tenancy of such parts of the premises as were not in use by the claimant to store and repair organs from other damaged churches. By a tenancy agreement, dated Sept. 4, 1944, the claimant let the premises to the company for the purpose of the company's business, but reserved the use of two rooms which it continued to occupy for the purposes of the trust, the intention being to terminate the tenancy and to resume possession of the entire premises for the purposes of the trust as soon as possible after the end of the war with Germany. On Sept. 15, 1945, the Minister of Health confirmed a compulsory purchase order made by the local authority in respect of the property, and on Feb. 25, 1946, the authority served a notice to treat on the claimant. It was now the intention of the claimant to set up a similar church and centre about four miles away from the acquired property, and it was contended on its behalf that compensation should be assessed on the basis specified in the *Acquisition of Land (Assessment of Compensation) Act, 1919*, s. 2, r. (5), as the land was devoted to a purpose of such a nature that there was no general demand for land for that purpose. The authority contended that r. (5) did not apply (a) as the premises did not come within the rule at the time of the notice to treat, and (b) as the setting up of a similar church and centre four miles away was not "reinstatement" within the meaning of the rule.

HELD: the words "devoted to a purpose" in s. 2, r. (5), of the Act of 1919 introduced a conception of intention and indicated a different test from that of the de facto use of the premises at the date of the notice to treat; in view of the circumstances which led up to the letting, during the currency of the letting the premises continued to be devoted to purposes of such a nature that there was no general demand for land for that purpose, within the meaning of r. (5), and they were so devoted at the date of the notice to treat; "reinstatement", within r. (5), was a question of degree and of fact; on the facts, reinstatement in some other place was bona fide intended within the meaning of the rule; and, therefore, compensation was to be assessed in accordance with the rule.

CASE STATED by the Lands Tribunal under the Lands Tribunal Act, 1949, s. 3 (4), and R.S.C., Ord. 58B, r. 2.

The claimant, Aston Charities Trust, Ltd., a private company which was formed to administer certain charitable endowments and which was incorporated on Apr. 28, 1930, owned premises, known as Durning Hall, Elsa Street, Stepney. On the upper floor of the premises were a Unitarian church and a concert hall, and on the lower floor were a meeting room, a loan club room, a gymnasium, a minister's vestry, and several other rooms. The premises were designed and built for the religious and charitable purposes of the trust and were used exclusively for those purposes until August, 1940, when, owing to war damage and to the departure from the neighbourhood of much of the local population in whose interests the trust was administered, some parts of the premises

remained unused by the claimant. In 1942, owing to further damage to the premises, the organ from the church on the first floor was removed to one of the rooms on the ground floor by Messrs. Kingsgate, Davidson and Co., Ltd., the makers of the organ, and, at a later date, that company agreed with the claimant to take a tenancy of such parts of the premises as the claimant was not using for the purpose of storing and repairing organs from other bombed churches. By a tenancy agreement, dated Sept. 4, 1944, the claimant let the premises to the company for the purpose of the company's business, but reserved out of the letting two rooms which it continued to occupy for the purpose of carrying out such objects of the trust as were still possible in the circumstances then prevailing. On Sept. 5, 1944, the acquiring authority, Stepney Borough Council, submitted for confirmation by the Minister of Health a compulsory purchase order in regard to the property. On Sept. 15, 1945, the Minister confirmed the order by the Stepney (Limehouse Fields Extension) Housing Confirmation Order, 1945, and on Feb. 25, 1946, the acquiring authority served a notice to treat on the claimant.

On a reference to the Lands Tribunal in regard to the assessment of the compensation payable to the claimant by the acquiring authority, the following facts were proved or admitted: (a) the letting to the organ company was necessitated by circumstances beyond the control of the claimant, and it was the intention of the claimant to terminate it and to resume possession of the premises for the purposes of the trust as soon as possible after the termination of the war with Germany; (b) up to the date when the occupation by the company commenced the land was devoted to a purpose of such a nature that there was no general demand for land for that purpose; and (c) as from the date of the notice to treat, the claimant had made diligent search for alternative premises in which to carry on the objects of the trusts and had had the funds to do so, and it was their bona fide intention to reinstate the premises in some other place. The claimant contended *inter alia* (i) that compensation should be assessed in accordance with the Acquisition of Land (Assessment of Compensation) Act, 1919, s. 2, r. (5), and (ii) that the expression "reasonable cost of equivalent reinstatement" in r. (5) meant the expense to be incurred at the time when such reinstatement was effected. The acquiring authority contended *inter alia* (i) that compensation should be assessed in accordance with the rule in the Town and Country Planning Act, 1944, s. 57 (1), and (ii) that, if compensation was to be assessed under s. 2, r. (5), of the Act of 1919, "reasonable cost" meant the cost as at the date of the notice to treat. The tribunal held *inter alia* (i) that at the date of the notice to treat the premises were "devoted" to the purposes of the trust so that there was no general demand for land for that purpose, within s. 2, r. (5), of the Act of 1919, and that compensation should, accordingly, be assessed on the basis of the reasonable cost of reinstatement, as provided by r. (5), and (ii) that the reasonable cost of reinstatement should be calculated on the basis of prices ruling at the date of the notice to treat. The acquiring authority appealed from the decision of the tribunal, but there was no appeal by the claimant on the question of the reasonable cost of the reinstatement.

Mitchison, Q.C., and *Horner* for the acquiring authority.

Lawrence, Q.C., and *Comyn* for the claimant.

SOMERVELL, L.J.: This is an appeal from a decision of the Lands Tribunal who have stated a Case under the Lands Tribunal Act, 1949, s. 3 (4). The question raised by the Case is in regard to the proper basis of compensation

in respect of the compulsory purchase by the metropolitan borough of Stepney of premises known as Durning Hall, which were the property of Aston Charities Trust, Ltd.

By the Town and Country Planning Act, 1944, s. 57 (1):

"Compensation for the compulsory purchase of an interest in land by a government department or a local or public authority within the meaning of the Acquisition of Land (Assessment of Compensation) Act, 1919, compensation to be estimated in connection with such a purchase for damage sustained by reason of the severing of land the subject thereof from other land held therewith or otherwise injuriously affecting such other land, and compensation under s. 68 of the Lands Clauses Consolidation Act, 1845, in respect of land injuriously affected by the execution of works on land acquired by such a department or authority, shall, except in the case of compensation assessed on the basis specified in r. (5) of the rules set out in s. 2 of the said Act of 1919, be assessed subject to the rule following . . ."

The rule in s. 57 (1), which can be summarised as the figures in this case are agreed, contained a provision that the value of the interest compulsorily purchased should be taken as on Mar. 31, 1939, and under s. 58 of the Act of 1944 there was a supplement to the compensation in the case of an owner-occupier. The question is whether these premises, Durning Hall, come within the cases specified in the Acquisition of Land (Assessment of Compensation) Act, 1919, s. 2, r. (5), or under what I will call the general provisions of s. 57 (1) of the Act of 1944. The Lands Tribunal have decided that the premises come within r. (5), and the compensation payable under that rule is substantially larger than if they came within the general provisions of s. 57. The Acquisition of Land (Assessment of Compensation) Act, 1919, s. 2, r. (5), is as follows:

"In assessing compensation, an official arbitrator shall act in accordance with the following rules . . . (5) Where land is, and but for the compulsory acquisition would continue to be, devoted to a purpose of such a nature that there is no general demand or market for land for that purpose, the compensation may, if the official arbitrator is satisfied that reinstatement in some other place is bona fide intended, be assessed on the basis of the reasonable cost of equivalent reinstatement."

[His LORDSHIP stated the facts, and continued:] The findings of the tribunal are set out in para. 10 of the Case, and the first is this:

"10 (i) That for the purpose of r. (5) of s. 2 of the Acquisition of Land (Assessment of Compensation) Act, 1919, the meaning of the word 'devoted' in relation to land differs from the meaning of the word 'used' and there may be circumstances in which the tribunal may decide that land which is devoted to purposes of such a nature that there is no general demand for land for such purposes may continue to be so devoted while being temporarily used for purposes not so qualifying."

The first question is whether that is right in law. Counsel for the acquiring authority does not dispute that prior to the war the premises, as then used, came within r. (5), but he submits that the words in r. (5):

"Where land is, and but for the compulsory acquisition would continue to be, devoted to a purpose of such a nature . . ."

point to the de facto use at the time of the notice to treat—subject, of course, to the principle of de minimis, e.g., if it happened that on the day of the notice

to treat the premises in question were temporarily let for a day or some short period to some other body, that, of course, could be disregarded. On this matter I have come to the conclusion that the tribunal were right. I think that the words "devoted to a purpose", in r. (5), introduce a conception of intention and are indicating a different test from that of the *de facto* use at the date of the notice to treat. Circumstances created by bombing caused a temporary interruption, all over the country, of the purposes to which many pieces of land were devoted. I think that the tribunal were right in holding that interruption of that kind which affected the *de facto* use at the date of the notice to treat could be disregarded. The point is a short one and I do not think it is capable of much elaboration. I agree with the way in which it is put by the Lands Tribunal in para. 10 (i) of the Case. It seems to me that para. 10 (ii) of the Case indicates that the tribunal have properly addressed their minds to the facts of this case. They find:

"10 (ii) That having regard to the circumstances of and leading up to the aforesaid letting to Messrs. Kingsgate, Davidson & Co., Ltd. [the organ company] the said premises continued to be devoted to the special purposes aforesaid during the currency of the said letting and were so devoted on the date of the notice to treat."

I think, therefore, that the first point taken by counsel for the acquiring authority fails.

The second point was with regard to reinstatement. The tribunal found as a fact, proved or admitted, that it was and is the claimant's bona fide intention to reinstate the said premises in some other place. The main controversy below appears to have been based on the fact that the evidence indicated that the claimant was proposing to set up a similar church and centre, not in Stepney, but some four miles away in Forest Gate. Counsel for the acquiring authority submitted that that was too far away and that, therefore, there was not sufficient identity in law to satisfy the word "reinstatement", within the meaning of r. (5). I think that this is a question of degree and of fact. Examples were given in the course of the argument of cases where reinstatement, in the ordinary sense, might take place a long way off but, having regard to the purpose, could still be described as "reinstatement". On the other hand, one can imagine a purpose confined locally to a narrow area, and, if the same sort of activity was started somewhere else, it might be said not to be "reinstatement". It must, in my opinion, be a question of degree, and, having regard to the facts, I am not satisfied that in dealing with this question, which is a question primarily of fact, the Lands Tribunal in any way misdirected themselves or misconstrued the words of r. (5). For these reasons I think that the two points taken by counsel for the acquiring authority fail, and, in my opinion, the appeal should be dismissed.

BIRKETT, L.J.: I agree with the judgment of my Lord.

HODSON, L.J.: I also agree.

Appeal dismissed.

Solicitors: *J. E. Arnold James*, town clerk, Stepney Borough Council (for the acquiring authority); *Cummings, Marchant & Ashton* (for the claimant).

G.F.L.B.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., SLADE AND PARKER, JJ.)

June 12, 1952

JAMES v. BOWKETT

Justices—Procedure—Offence triable summarily or on indictment—No formal application by prosecutor for summary trial—Election by defendant to be tried summarily—Case opened by prosecutor and witnesses called—Criminal Justice Act, 1948 (11 and 12 Geo. 6, c. 58), s. 28 (1).

A defendant was charged before justices with an offence punishable on summary conviction or on indictment. No formal application was made under s. 28 (1) of the Criminal Justice Act, 1948, by the prosecutor for the case to be tried summarily, but the defendant, on being told by the clerk to the justices of his right to be tried by a jury under s. 17 (1) of the Summary Jurisdiction Act, 1879, elected to be tried summarily and pleaded Not Guilty. The prosecutor then opened his case and called his evidence, but at the close of the case for the prosecution the defendant's solicitor objected that, because no application for summary trial had been made to the justices by the prosecutor before the charge had been entered upon, the justices had no jurisdiction to try the case summarily, but must deal with as if it were punishable on indictment only. The justices held that they were entitled to proceed with the summary trial.

Held, that the decision of the justices was right, as by opening the case after the defendant's election the prosecutor had impliedly applied to the justices for summary trial within the meaning of s. 28 (1) of the Act of 1948 and the defendant had consented to summary trial.

Per curiam: It is better in such a case for the clerk to the justices to ask the prosecutor whether he is asking for summary trial.

CASE STATED by Monmouthshire justices.

At a court of summary jurisdiction sitting at Chepstow an information was preferred by the respondent under s. 15 (1) of the Road Traffic Act, 1930, charging the appellant with having been unlawfully under the influence of drink to such an extent as to be incapable of having proper control of a Bedford motor lorry of which he was in charge on the Chepstow-Monmouth road, at Tintern, on Jan. 1, 1952. At the hearing of the information on Jan. 15, the following facts were proved. The appellant was seen by a police officer on the Chepstow-Monmouth road, staggering, apparently indifferent to danger from a passing motor vehicle, and smelling of drink. Shortly afterwards he was stopped by the officer when driving a lorry from the Wye Valley Hotel on to the road, he being then in the same condition. When the case was called before the justices no application was made by the respondent before the charge had been entered on that the case should be tried summarily, and the attention of the justices was not called to the provisions of s. 28 (1) of the Criminal Justice Act, 1948. The clerk of the court read the charge to the appellant, who was represented by a solicitor, and informed him of his right under s. 17 (1) of the Summary Jurisdiction Act, 1879, to be tried by a jury. The appellant elected to be tried summarily and pleaded Not Guilty. The respondent then called his witnesses and closed his case. The appellant's solicitor submitted that, by reason of the provisions of s. 28 (1) of the Criminal Justice Act, 1948, the justices had no jurisdiction to try the case summarily, but must deal with it as if it were punishable on conviction on indictment only, because no application had been made to them by the respondent before the charge had been entered upon for the case to be tried summarily. The respondent contended that, while he had omitted to make a formal application for the trial of the case summarily, the appellant had been given the opportunity of going for trial by a jury and had elected to be tried

summarily. The justices held that in the circumstances the appellant was estopped from claiming that the case should not be dealt with summarily, that no injustice was done by the omission of the respondent to make a formal application, and that the appellant was not at any time under any misapprehension as to the fact that the case was being dealt with summarily. They determined, therefore, to proceed with the adjudication, and the appellant appealed against that determination. The appellant appealed.

L. Caplan for the appellant.

F. W. I. Barnes for the respondent.

LORD GODDARD, C.J.: Section 28 (1) of the Criminal Justice Act, 1948, deals with offences punishable on summary conviction or on indictment. It provides:

"Subject to the provisions of this section, where a person who is not less than fourteen years of age is charged before a court of summary jurisdiction with an offence which, by virtue of any enactment, is punishable either on summary conviction or on conviction on indictment, then if application in that behalf is made by the prosecutor before the charge has been entered upon, the court may then determine to try the case summarily; but if the court does not so determine it shall proceed to hear the case as if the offence were punishable on conviction on indictment only."

The sub-section does not apply to cases which are generally indictable and are only triable summarily with the consent of the accused under s. 11 (1) of the Summary Jurisdiction Act, 1879, or s. 24 (1) of the Criminal Justice Act, 1925. It applies to cases in which the defendant may be tried either summarily or on indictment. Here, being liable on summary conviction to four months' imprisonment, the appellant had to be given the option of trial by jury under s. 17 (1) of the Summary Jurisdiction Act, 1879, and when the case was called on the justices' clerk asked him if he desired to be tried by a jury. He elected to be tried summarily, and the respondent opened the case for the prosecution.

Counsel for the appellant has argued that s. 28 (1) of the Act of 1948 prevents the justices' trying the case summarily unless the prosecutor or his representative has said: "Will you please try this case summarily". It would have made a very great change in the law if justices had been deprived of their statutory right to try summarily a case which the defendant wished to be tried summarily merely because some such form of words had not been used. In my opinion, this statute was not intended to alter the law in the way suggested. I think its object was only to enable it to be intimated to the justices as soon as the case came on that the prosecutor was not asking for the case to be sent for trial. That would relieve them of the need to take depositions, unless they found in the course of their inquiry that it was a serious case, when they would have to begin again, recalling the witnesses for depositions to be taken, and sending the case for trial. I think that s. 28 is simply a procedural section. It does not confer rights; it preserves the right of the defendant to object to a summary trial and to have his case dealt with by a jury, but I do not think it does more than that. I do not think that s. 28 (1) lays down conditions precedent which have to be complied with by means of some particular form of words. It does not provide that the prosecutor must ask for the case to be dealt with summarily before the defendant has been informed of his right to a trial by jury. It would have been open to the respondent in the present case to ask the justices to send the case for trial, but no one wanted that, and, as soon as the appellant had said he wished the case to be dealt with summarily, the respondent, by opening his case, must be

taken to have applied to the court to deal with it summarily. I am not prepared to hold that, merely because the prosecutor has not said to the justices: "Will you please deal with the case summarily", when the prosecutor and the defendant have shown that that is what they require and the justices have agreed, there has not been sufficient procedural compliance with s. 28 (1) to enable the justices to hear the case.

In the present case, although the justices did not have the point expressly brought to their attention, there was impliedly an application by the respondent to try the case summarily, there was consent by the appellant to be tried summarily, and, therefore, it was perfectly proper for the justices to hear the case. It would, perhaps, be better in such case for the clerk to ask the prosecutor: "Are you asking for summary trial?", when he could say Yes or No, but here the application was impliedly made, it was accepted as having been impliedly made, and it cannot be suggested there has been any embarrassment or injustice done to the appellant. When the prosecutor is ready to go on and the defendant raises no objection, what else is the prosecutor doing but asking the justices to deal with the case summarily? This appeal fails, and the case will be remitted to the justices with an intimation that they came to a correct determination according to law and that they must complete the hearing by hearing any evidence the appellant may wish to give.

SLADE, J.: I agree.

PARKER, J.: I agree.

Case remitted.

Solicitors: *Gillhams*, agents for *Leslie J. Slade*, Newent, Gloucestershire (for the appellant); *Torr & Co.*, agents for *W. K. G. Thurnall*, county prosecuting solicitor, Monmouth County Council, Newport, Monmouthshire (for the respondent).

T.R.F.B.

COURT OF APPEAL

(SOMERVELL, BIRKETT and HODSON, L.JJ.)

June 16, 1952

BAKER v. BAKER

Divorce—Desertion—Parties living under same roof—House owned by both spouses—No allowance paid to wife—Provision of meals separately—Occupation of separate rooms—Other parts of house shared.

On an undefended petition for divorce brought by a husband against his wife on the ground of desertion it was proved that for more than three years before the presentation of the petition the parties had lived in the same house, which belonged to them both, but each occupied a separate bedroom and sitting-room and cooked their own food separately. During that time the husband had not paid any allowance to the wife. They shared the kitchen and the passages and other parts of the house, but whenever possible they avoided meeting.

HELD: on these facts the parties had ceased to be one household and had become two separate households, and the wife had deserted the husband.

Walker v. Walker (ante, p. 346), followed.

Decision of *WILLMER, J.* (ante, p. 91), reversed.

APPEAL by the husband from an order of *WILLMER, J.*, dated Jan. 11, 1952, and reported [1952] 1 All E.R. 297, dismissing an undefended petition for divorce

on the ground of desertion. It was conceded that the parties lived in the same house throughout the three years before the presentation of the petition and WILLMER, J., held that on the facts it could not be said that they had ceased to be one household and had become two separate households and, therefore, desertion had not been proved.

J. K. Wood for the husband.

SOMERVELL, L.J.: The husband petitioned for divorce on the ground of his wife's desertion, and sought to establish that desertion although during the relevant period the parties had continued to live under the same roof. The principle to be applied in such cases has been considered on more than one occasion by courts of first instance and in this court. In *Hopes v. Hopes* (1) BUCKNILL, L.J., after reviewing a number of cases on the subject, said:

"The cases to which I have referred establish that there may be desertion, although husband and wife are living in the same dwelling, if there is such a forsaking and abandonment by one spouse of the other that the court can say that the spouses were living lives separate and apart from one another."

DENNING, L.J., said:

"That line [i.e., the line between desertion and gross neglect or chronic discord] is drawn at the point where the parties are living separately and apart. In cases where they are living under the same roof, that point is reached when they cease to be one household and become two households, or, in other words, when they are no longer residing with one another or cohabiting with one another."

In the present case the parties were married in September, 1936. The husband was away during the war. When he came back in 1945 his wife not only received him coldly, but also arranged that he should sleep apart from her in a room with a Mr. Knight, who was lodging in the house, and she locked her door against him. Since that date the parties have occupied separate bedrooms, and in that sense have ceased to cohabit. In March, 1948, the husband stopped paying his wife an allowance, and since then she has not cooked or done anything else for him. They use the same kitchen and lavatory accommodation, but, so far as possible, they never meet, even in the kitchen. She has her own bedroom and sitting-room and he has his. She did clean the bedroom in which he and Mr. Knight were sleeping so long as Mr. Knight remained there, but after he left she ceased to do that. She cleaned the kitchen, though it is clear from the evidence that, so far as the implements which the husband used for cooking were concerned, he cleaned them himself, and he cleaned the bath after he had used it. The learned judge raised the question whether the husband had sought to get other accommodation, and the husband gave as his reason for remaining that the house was the joint property of himself and his wife. Though, no doubt, the fact that a husband or wife has tried and failed to get separate accommodation may be material, the fact that that has not been done cannot, I think, be in any way conclusive of the question whether there are two households and the parties are living separate and apart. The learned judge was not satisfied, to take the phrase of DENNING, L.J., that there were two households. He refers to the reason for the husband not leaving the house, to the fact that there was no separate kitchen, and to the fact that the parties shared the passages, stairs and other offices of the house. With regard to the sharing of the passages and

(1) 113 J.P. 10; [1948] 2 All E.R. 920; [1949] P. 227.

stairs, I think that has almost always been so in cases where the two parties have been living under the same roof.

Since the learned judge gave his judgment there has been a decision of this court in *Walker v. Walker* (1). There a husband and wife lived in the same house, but occupied separate rooms. The husband, although sharing the kitchen, did all his own cooking, and his wife did nothing for him. The husband appealed against the dismissal of his petition for divorce on the ground of desertion. In allowing the appeal this court held that, but for the imperative need to use the same kitchen, in no sense could it be said that there was one household. BIRKETT, L.J., with whom the other lords justices agreed, summed it up in this way:

"The only element of living together was that the husband and the wife were actually residing in one house and there was no physical separation between the parts of the house in which they were living. They were compelled to cook their meals in the same kitchen, and the only thing the husband did in that way was to cook his meal on Sunday morning at some time different from the time at which the wife used the kitchen. To say that these people were in any sense living together—that in any sense there was one household—is impossible on the facts in this case."

The only difference that could be suggested between that case and the present, is that in the present case the husband cooked his meals more often than once a week. To my mind, that cannot lead to a different conclusion. Apart from that fact, in principle this case is indistinguishable from *Walker v. Walker* (1), and the ingredients which the learned judge relied on as preventing him from finding a separate household were in substance the ingredients which this court decided did not prevent such a conclusion in *Walker v. Walker* (1). For these reasons I would allow the appeal and grant a decree.

BIRKETT, L.J.: I am of the same opinion.

HODSON, L.J.: I agree.

Appeal allowed.

Solicitors: *Sidney Davidson & Co.* (for the husband).

G.F.L.B.

(1) ante p. 346.

PROBATE, DIVORCE AND ADMIRALTY DIVISION

(LORD MERRIMAN, P., AND PEARCE, J.)

June 24, 1952

HAYNES v. HAYNES

Justices—Husband and wife—Separation order—Variation—Deletion of non-cohabitation clause—Husband's desire to make amends and resume married life—Summary Jurisdiction (Married Women) Act, 1895 (58 and 59 Vict., c. 39), s. 7.

On Mar. 31, 1952, justices found the husband guilty of persistent cruelty and made a separation order in favour of the wife. On appeal by the husband,

HELD: it was open to the justices to make the order, which, therefore, would not be set aside, but, if the husband were to satisfy the justices that he realised that the separation was his fault and that he wished to make amends, that would be fresh evidence within the meaning of s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, on which the justices could vary the order by deleting the non-cohabitation clause.

APPEAL by the husband against a decision of the Banbury, Oxfordshire, justices dated Mar. 31, 1952, whereby they found him guilty of persistent cruelty and made a separation order in favour of the wife with an award of maintenance. The husband contended that, even if the justices' finding of persistent cruelty could not be upset, this was not a proper case in which to make a separation order.

Lermon for the husband.

A. L. Gordon for the wife.

LORD MERRIMAN, P.: This is a husband's appeal against an order made on Mar. 31, 1952, by the Banbury borough justices in favour of the wife on the ground of the husband's persistent cruelty. It is conceded that it is very difficult to argue that there was not evidence which, if accepted, justified the finding of the justices that the wife had been subjected to a constant course of conduct of such a kind as to make her continuously miserable and cause her seriously to lose her health, but it is said, on the assumption that it is not possible to upset that finding, that it was not right to make a separation order, even though the finding was one of persistent cruelty.

[His LORDSHIP stated the facts and continued:] I am not going to describe this as a case of extreme cruelty; it is obviously a case which is near the line. The justices have found the facts, and it was virtually admitted that it would be very difficult for us to reverse their finding. I think so, too. That brings me to what I think is the real difficulty in this case, which has caused me some anxiety. It is the question whether it is or is not a proper case for a separation order, particularly bearing in mind, that, except for a laudable attempt on the part of the solicitors on both sides to bring about a reconciliation, which lasted a few weeks before the final parting, no outside influence has been brought to bear in an attempt to save this marriage. So long as the non-cohabitation clause remains in the order it is a bar to any serious attempt by the husband to get his wife back, because she is not obliged to receive him. The justices have given the matter a very patient and careful hearing and have obviously come to the conclusion that a separation order was the proper order to make, and I feel great diffidence in saying that they were wrong. But, though I am not prepared to modify the order by eliminating the non-cohabitation clause, I think it is highly desirable that it should be understood by everybody that the door need not necessarily be bolted and barred for ever.

Reference has been made to some observations which I am reported as having made in *Hutchison v. Hutchison* (1), where, after adhering to what I am reported to have said in *Edwards v. Edwards* (2) in relation to the kindred topic of constructive desertion, I was trying to point out that every case must be dealt with on its merits and that it is a question of degree what amends it must be open to the husband to make and the wife to insist on before any question of a resumption of cohabitation arises. I am reported to have said:

"I do not take the view that as a matter of degree the circumstances of this particular case entitle the wife to sit down on her order for all time, and refuse ever to consider approaches, however humble, however contrite, however real, on the part of the husband to resume this all-too-brief married life. But they must be approaches which are made with a very clear realisation that he has learned his lesson, and with the very clear realisation that if that sort of conduct is repeated the wife will have a clear-cut case for reviving the charge of cruelty which she established before the condonation."

I think that describes my view about this case, although, of course, I recognise that, so long as this non-cohabitation clause stands, the wife can resist any overtures. In my opinion, however, it is open to the husband, if he has learned his lesson and is prepared to realise that it is his fault that this marriage has been broken up and that this separation order has been made, to approach the wife and the court in that frame of mind, and I know of no legal impediment to an application to the court under s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, for a variation of the order by eliminating the non-cohabitation clause. I am certainly not going to lay down or dictate what the justices should do if that situation arises beyond calling their attention to the general observations to which I have referred. I do not think it is open to us to say that they were wrong in including the non-cohabitation clause in this order. I am merely pointing out that, given a new set of circumstances which, of course, will clearly amount to fresh evidence and good cause under s. 7, it is open to them to vary the order in this respect, as in other respects, and I merely add the obvious comment that probably, if that case is presented to them, they would think it was the right moment, before coming to any final decision, to invoke the assistance of their probation officer to see what could be done about pulling this marriage together before it is too late. It only remains to add that, as I see no reason for interfering with the decision of the justices, the appeal must be dismissed.

PEARCE, J.: I agree. There was ample evidence on which the justices could come to the conclusion at which they arrived, but if the husband can realise the error of his ways, can see his wife's point of view, and can provide some reasonable assurance that in future he will respect her natural desire for independence both as a wife and as a mother, I see no reason why they should not be able to resume married life together. If his conduct gives reason to believe that that result can be achieved I think the justices would favourably consider an application for the removal of the non-cohabitation clause.

Appeal dismissed.

Solicitors: *Kingsford, Dorman & Co.*, agents for *Dawe & Co.*, Kingston-on-Thames (for the husband); *Preston, Lane-Clayton & O'Kelly*, agents for *Cole & Cole*, Oxford (for the wife).

G.F.L.B.

(1) [1951] W.N. 296.

(2) 112 J.P. 109; [1948] 1 All E.R. 157; [1948] P. 268.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J.)

June 25, 27, 1952

GREEN AND ANOTHER v. THAMES LAUNCHES, LTD.

Licensing—Passenger vessel—Sale not restricted to permitted hours—Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), sched. I, Part D—Licensing Act, 1921 (11 and 12 Geo. 5, c. 42), s. 1 (1), s. 18.

The sale of intoxicating liquor to a passenger on board a passenger vessel in respect of which a passenger vessel licence for the sale of such liquor has been granted by the Commissioners of Customs and Excise under the Finance (1909-10) Act, 1910, s. 43, and sched. I, Part D, is not restricted to the hours during which intoxicating liquor may be sold on licensed premises under the Licensing Act, 1921, s. 1 (1).

Gallagher v. Rudd (1898) (61 J.P. 789), distinguished.

ACTION for a declaration and injunctions.

The plaintiffs were shareholders in the defendant company which owned a fleet of seventeen passenger vessels in respect of twelve of which the company or their servants held excise licences for the sale of intoxicating liquor and tobacco to passengers on board the vessels. The plaintiffs contended that since 1945, contrary to the provisions of the Licensing Act, 1921, the defendants had habitually sold, and that they intended to continue to sell, intoxicating liquor by retail in each of the twelve vessels to passengers for consumption in the vessels at times other than those prescribed in the Act as the permitted hours. In particular, they said that on May 25, 1952, the defendants' motor vessel, *Queen Elizabeth*, left Westminster at 11.30 a.m. carrying passengers, and, after calling at Putney, Kew, Richmond and Kingston, arrived at Hampton Court at 3.45 p.m., and that the vessel left Hampton Court at 4.30 p.m. carrying passengers, and, after calling at Kingston, arrived at Richmond at 5.30 p.m. Except between 3.45 and 4.30 p.m., and when the vessel was alongside piers or embarking or disembarking passengers, the defendants throughout sold intoxicating liquor to passengers and permitted passengers to consume them in the vessel.

The plaintiffs sought a declaration that it was illegal for the defendants to sell by retail, or permit the consumption of, intoxicating liquor in the vessels while engaged in carrying passengers except during the permitted hours under the Licensing Act, 1921. They also claimed injunctions restraining the defendants from selling by retail, and from permitting passengers to consume, intoxicating liquor in the vessels while engaged in carrying passengers except during such permitted hours. The defendants denied that the facts alleged, which they admitted, disclosed any breach of the Licensing Act, 1921, and contended that they were authorised by their excise licences to sell by retail intoxicating liquor in the vessels while carrying passengers for passengers to consume it on board, and that the provisions of the Licensing Act, 1921, relating to permitted hours did not apply to the sale and consumption of intoxicating liquor in the vessels while engaged in carrying passengers.

Wingate-Saul for the plaintiffs.

Percy Lamb, Q.C., and Gordon Hardy for the defendants.

Cur. adv. vult.

June 27. LORD GODDARD, C.J., read the following judgment: The defendants are a company owning a fleet of passenger vessels plying on the river

Thames for the conveyance of passengers between Westminster and Hampton Court. The master of each of these vessels or some other person belonging thereto holds a passenger vessel licence granted by the Commissioners of Customs and Excise under the Finance (1909-10) Act, 1910, s. 43 and sched. I, enabling him to sell intoxicating liquor to passengers on board the vessel, and the plaintiffs, who are shareholders in the company, bring this action claiming certain declarations and injunctions with the object of obtaining a decision whether intoxicating liquor can be lawfully sold on board these vessels at hours other than those permitted by the Licensing Act, 1921.

Section 43 of the Finance (1909-10) Act, 1910, provides that:

"There shall be charged, levied, and paid on the licences for the manufacture or sale of intoxicating liquor specified in sched. I to this Act, the duties of excise specified in that schedule, and the provisions expressed in that schedule to be applicable to any such licences shall have effect with respect to those licences."

Part D of the schedule (under the heading "Passenger Vessel Licences") provides for a duty of £10 to be paid in respect of an annual licence taken out by the master or other person belonging to the vessel nominated by the owner, and a duty of £2 if it is to be in force for one day only. The provisions applicable to these licences are that a passenger vessel licence granted in respect of any vessel authorises the sale by retail while the vessel is engaged in carrying passengers of any intoxicating liquor on board the vessel to passengers for consumption on board the vessel, and authorises the sale of tobacco as well as of intoxicating liquor. A passenger vessel is defined in s. 52 and means:

"... a vessel of any description employed for the carriage and conveyance of passengers which goes from any place in the United Kingdom to any other place in the United Kingdom, or goes from and returns to the same place in the United Kingdom on the same day."

The Licensing Act, 1921, ss. 1, 2, and 20, substituted hours during which liquor may be sold on licensed premises for provisions in the Licensing (Consolidation) Act, 1910 (ss. 54, 56, and sched. VI) which prescribed the hours during which premises had to be closed, so that any offence dealing with this subject-matter now is for the sale otherwise than during permitted hours whereas formerly it was for the sale during closing hours.

The contention of the plaintiffs briefly is that the matter is governed by s. 18 of the Act of 1921 which provides that the provisions of the Act with respect to licensed premises apply to any premises or place where intoxicating liquors are sold by retail under a licence, so it is said that the sale in a passenger vessel can only take place within the same hours as liquor can be sold at licensed premises on shore. By s. 22 (2) of the Act of 1921 that Act is to be construed as one with the Licensing (Consolidation) Act, 1910, and by s. 111 (2) of the latter Act it is provided:

"Nothing in this Act shall affect or apply to ... (f) the sale of intoxicating liquor in passenger vessels in pursuance of the Acts in that behalf."

Fully to appreciate the contentions on either side it will be convenient to deal as briefly as may be in chronological order with the Acts which have dealt with the sale of liquor on board passenger vessels.

By the Excise Licences Act, 1825, s. 13, it was provided that no excise licence should be granted for the sale of any beer or cyder or perry by retail to be drunk or consumed on the house or premises of the person applying for such licence unless a justices' licence permitting the applicant to sell it had been first granted.

I can find nothing to suggest that it was ever thought that a house or premises in this section included a vessel of any description. By the Passage Vessel Licences Act, 1828, it was recited in the preamble that it would greatly tend to the convenience and accommodation of passengers in vessels if the master or commander or other person of or belonging to such vessels were by law authorised to provide for and to retail and sell to such passengers carried in packet boats and other vessels from one part of the United Kingdom to another part not only the liquors referred to in s. 13 of the Act of 1825, but also foreign wine, spirituous liquors and tobacco. The Act, by s. 1, authorised the commander or some other person to be licensed to retail such liquors, but only to passengers on board such vessels and to be consumed by them in and on board thereof during the voyage. The section concluded with the words:

"anything in any Act or Acts in force immediately before the passing of this Act to the contrary notwithstanding."

On the same day as this Act received the royal assent the well-known Alehouse Act, 1828, also became law. That Act dealt generally with the grant by justices to fit and proper persons of licences authorising them to keep inns and alehouses and to sell excisable liquors of all sorts, but as it came into force contemporaneously with the Passage Vessel Licences Act, 1828, it was not in force immediately before the passing of the latter Act. By s. 42 of the Metropolitan Police Act, 1839, it was enacted that no licensed victualler or other person should open his house within the metropolitan police district for the sale of liquor on Sundays, Christmas Day and Good Friday before the hour of one in the afternoon except for refreshment for travellers. It seems to have been recognised that that section did not apply to the sale of liquor on board a ship that was moored in the Thames, and, no doubt, sellers of liquor took full advantage of that situation. So, by the Licensing Act, 1842 (an Act for the transfer of licences and regulation of public houses), s. 5, which is still in force, it was expressly provided that:

"No wines, spirits, or other excisable liquors shall be sold by retail on board of any boat, steamboat or other vessel which shall be moored or lying at anchor within the metropolitan police district, during the hours and times on Sundays, Good Friday, and Christmas Day on which licensed victuallers are by law obliged to keep their houses closed . . ."

This, it will be noticed, has no application when the boat or vessel is on a voyage on the river. There the matter rested until the Licensing Act, 1872. By s. 72 of that Act it was provided that nothing in the Act should affect or apply to, *inter alia*, the sale of intoxicating liquor by proprietors of theatres in pursuance of the Acts in that behalf and the sale of intoxicating liquor in packet boats in pursuance of the Acts in that behalf. I mention here the provision with regard to theatres because of a decision on which the plaintiffs rely and with which I shall deal hereafter. The Finance (1909-10) Act, 1910, to which I have already referred, received the royal assent on Apr. 29, 1910, and on Aug. 3 the Licensing (Consolidation) Act, 1910, became law. In the latter Act the expression "licensed premises" is defined in s. 110 as meaning

"premises in respect of which a justices' licence has been granted and is in force."

By s. 111 (2) (e) and (f), the same exemption regarding theatres and passenger vessels is found as in the Act of 1872, and in the same words, except that the words "passenger vessels" are used instead of "packet boats". The only other statutory provision to which I think it is necessary here to refer is s. 18 of the Licensing Act, 1921, the effect of which I stated earlier, but, as the Act of 1921, by

s. 22 (2), is to be read together with the Licensing (Consolidation) Act, 1910, it follows that the exemption contained in that Act applies also to the Act of 1921, and, therefore, the provisions of s. 18 applying the provisions of the Act with respect to licensed premises to any premises or places where intoxicating liquors are sold under a licence do not apply to the sale of intoxicating liquor in passenger vessels in pursuance of the Acts in that behalf. It is, therefore, clear that from 1828 onwards the sale of intoxicating liquor in passenger vessels, provided an excise licence has been granted, has always been kept free from the provisions of general licensing Acts provided only that the sale has been in pursuance of the Acts relating to sales in these vessels, and it is to be observed that the Act of 1828 was not repealed till the Finance (1909-10) Act, 1910.

The Finance (1909-10) Act, 1910, which deals with the duty and the provisions applicable to such licences, contains in sched. I, Part D, under the heading Passenger Vessel Licences, in substance the same provisions as the Passage Vessel Licences Act, 1828. The sale must be on board a passenger vessel as defined in the Act, and liquor can only be supplied to passengers for consumption on board the vessel and during the voyage. So the place, the time, and the customers are all designated by the Acts, and, in my opinion, it would be perfectly clear that the permitted hours which apply to sales on land do not apply to sales on passenger vessels were it not for a difficulty apparently caused by the decision in *Gallagher v. Rudd* (1). That was a case dealing with a sale at a theatre, and it will be remembered that the Act of 1872 excluded the sale of intoxicating liquor by proprietors of theatres in pursuance of the Acts in that behalf as it did the sale of intoxicating liquor in packet boats. The Divisional Court held that that exemption did not apply to exempt the proprietor of a theatre from the statutory provisions relating to selling intoxicating liquor during closing hours. The court held that the effect of the exemption was only to allow the proprietor of a theatre to obtain an excise licence without obtaining a justices' licence. WRIGHT, J., having rejected two possible constructions, said:

"There remains a third possible meaning—namely, that although the exemption is not absolute, and is not limited to the mere sale, yet it is an exemption limited to the express statutory provisions with respect to theatres. One of those is that proprietors of theatres may sell intoxicating liquors by retail under an excise licence; they are not required to have a justices' licence. I think that the words in sub-s. (4) 'in pursuance of the Acts in that behalf', intend to limit the exemption to the particular rights which are given to proprietors by the Acts in that behalf. One effect of that is that some of the other exemptions contained in s. 72 will not be affected—at any rate the eighth exemption will not. I think that the same principle of construction would apply to the sale of intoxicating liquors in packet-boats and canteens."

It is, therefore, said that that decision should be followed in deciding the present case. Admittedly, the opinion expressed by the learned judge is only obiter, but great weight attaches to any opinion of his, more especially on the construction of statutes. I am, however, by no means certain that he meant to say that, so far as the sale of intoxicating liquor in packet boats was concerned, it was clear, in his opinion, that the exemption only excused the licensees from getting a justices' licence. What he was holding was that the words in s. 72 (4) of the Act of 1872 were intended to limit the exemption to the particular rights which are given to proprietors by the Acts in that behalf. The enactment which applied to theatres was the Excise Act, 1835, s. 7, which provided that it should

(1) 61 J.P. 789; [1898] 1 Q.B. 114.

be lawful for the commissioners and officers of excise to grant retail licences to any person in any theatre licensed by the Lord Chamberlain or by justices of the peace without the production by the person applying for such licence of any certificate or authority for such person to keep a common inn, alehouse or victualling house. In view of those words, I understand the court to have meant that the only privilege conferred on a theatre owner was to obtain an excise licence without first obtaining a justices' licence, but it seems to me that the provisions of the Acts dealing with sales on board passenger vessels are much wider. I have already pointed out that the Acts themselves lay down where liquor may be sold, to whom it may be sold, and when it may be sold, the latter being during the voyage and only during the voyage. When the Act of 1882 was passed it was clear, I think, that no one could have contended that the master of a passenger vessel either ought to or could have obtained a justices' licence. Justices only granted licences in respect of alehouses, and, no doubt, did so before the Alehouse Act, 1828, came into force. It does not seem to me, therefore, that the reasoning which was applied by this court to theatres applies to passenger vessels.

The provisions of the Finance (1909-10) Act, 1910, apply to railway refreshment cars (sched. I, Part E (Railway Restaurant Car Licences)), and have now been applied to aircraft (sched. I, Part CC (Passenger Aircraft Licences) (as added by Finance Act, 1946, s. 9 (1)) and it seems to me to be impossible to hold that provisions with regard to permitted hours can apply to the sale of liquor in aircraft nor has it ever been suggested that they apply to restaurant cars. The extraordinary difficulties which would arise with regard to passenger vessels, restaurant cars, or aircraft, can easily be appreciated when it is remembered that nowadays permitted hours vary, not only from county to county, but often from one licensing district to another. Justices under s. 1 (1) of the Licensing Act, 1921, have a considerable discretion as to permitted hours. In the provinces they can fix any eight hours beginning not earlier than 11 a.m. and ending not later than 10 p.m. with a break of at least two hours after 12 noon. In the metropolis, nine hours are substituted for eight and 11 p.m. for 10 p.m. Outside the metropolis justices can substitute eight and a half hours for eight and 10.30 for 10 o'clock at night, and can substitute some hour earlier than 11 a.m. but not earlier than 9 a.m. for 11 a.m. Thus it will be seen that it would be quite impracticable to apply the provisions of permitted hours to sales taking place during journeys which must pass through different districts where no uniformity may prevail. It is also a remarkable fact that it has never yet been suggested in this court that the provisions with regard either to closing hours or to permitted hours apply to these vessels although the Act of 1872 which first imposed closing hours has been in force now for eighty years. For these reasons, in my opinion, this action fails, as I decide that the provisions with regard to permitted hours do not apply to passenger vessels.

Judgment for defendants.

Solicitors: *B. Hoddinott & Son* (for the plaintiffs); *Lovell, White & King* (for the defendants).

G.F.L.B.

COURT OF CRIMINAL APPEAL

(LORD GODDARD, C.J., HILBERY, SLADE, DEVLIN & PARKER, J.J.)

June 17, 27, 1952

REG. v. MIDDLESEX JUSTICES. *Ex parte* DIRECTOR OF PUBLIC PROSECUTIONS

Certiorari—Acquittal at quarter sessions—Irregular trial—No error apparent on face of record—Defendant properly arraigned and jury sworn—Jury invited by chairman to acquit before evidence called—Views on possibility of conviction expressed by chairman.

A defendant was charged at quarter sessions with driving a motor vehicle while under the influence of drink and with dangerous driving. He pleaded Guilty to the latter charge, and Not Guilty to the former. Before the jury were sworn the chairman told prosecuting counsel in the presence of the jury that he had read the depositions very carefully and that he did not think any jury would convict on the former charge. Counsel for the prosecution, however, desired to proceed and the jury were sworn and the defendant put in their charge. Counsel then opened his case, but, before any evidence was called, the chairman invited the jury to look at specimens of the defendant's handwriting provided by him during his examination by the police doctor and expressed the view that these did not suggest that the defendant was under the influence of drink. He then asked the foreman of the jury whether they wished to hear the evidence on that charge, and the foreman replied: "Under your direction, I should say No, my Lord", and a verdict of "Not Guilty by direction" was recorded. On motion for certiorari to quash the acquittal,

Held: that, though the trial had been deplorably irregular, it did not amount to a mistrial in that no error would have been apparent on the face of the record, the defendant had been properly arraigned, and the jury had been properly sworn to try him, so that technically he had been in peril. The court had, therefore, no power to order a venire de novo, and certiorari must be refused.

Per curiam: No case is to be found in the books in which the court has ordered a re-trial after a verdict of Not Guilty.

MOTIONS for orders of certiorari and mandamus.

The Director of Public Prosecutions moved for an order of certiorari to quash the acquittal of the defendant on the first count and for an order of mandamus directing quarter sessions to try him on that count.

The *Attorney-General* (Sir Lionel Heald, Q.C.), *Melford Stevenson*, Q.C., and *Buzzard* for the Director of Public Prosecutions.

Hylton Foster, Q.C., and *F. H. Lawton* for the justices.

J. C. G. Burge for the defendant.

Cur. adv. vult.

June 27. **LORD GODDARD, C.J.**, read the following judgment of the court. The *Attorney-General* moves for an order of certiorari to remove into this court and quash the purported acquittal of one Peter Edward Bromley-Martin recorded by Middlesex Quarter Sessions on May 7, 1952, and an order of the quarter sessions discharging the said Bromley-Martin on the first count of an indictment against him charging that he on Mar. 24, 1952, when driving a motor vehicle on Watford Way, Edgware, was under the influence of drink to such an extent as to be incapable of having proper control of the motor vehicle, and for an order of mandamus that the quarter sessions do try the defendant on this count. In substance the ground on which the orders were sought was that the defendant had never been tried on the indictment and that the chairman of quarter sessions, without any evidence being called or given, had directed or procured the jury to return a verdict of Not Guilty so that the purported trial was in effect a nullity.

[HIS LORDSHIP dealt with the facts (which are summarised in the headnote) and continued:] The court can only express its gravest disapprobation of the conduct of the chairman. He is a man to whom the lay members of the court have a right to look for guidance and on whom they are entitled to rely for the proper conduct of cases which are brought to be tried on indictment before them. The explanation which he has offered is that from his experience gained at the Bar and as chairman of various quarter sessions he was quite certain that no jury would have convicted. It was not for the chairman to try the case himself. The prosecution had a right to present their case. It is not his duty to take sides or to do all he can to secure the acquittal of a prisoner. It is his duty to hold the scales evenly and to sum up the case if there is evidence fit to be left to the jury, as on the depositions in the present case there unquestionably was, and to place before them fairly and impartially the evidence given by the prosecution and the matters submitted by the defendant. That a judge may express his own opinion on matters arising out of the evidence there is no doubt, and no one would wish to prevent his doing so, provided he does it temperately and fairly. The chairman has said in his affidavit that he did not intend to withdraw the case from the jury, nor did he intend to direct them what to do. He says that he intended that the jury should there and then consider whether they wanted to hear evidence to support the facts opened by counsel for the prosecution when such facts disclosed what he thought was a weak case. We find it difficult to accept that explanation, for what he did could only have indicated that he desired the jury to stop the case, and, indeed, that he was determined they should do so. From first to last the conduct of the chairman in this case can only be described as both unjudicial and injudicious. This was a serious case, preferred by the direction of the Commissioner of Metropolitan Police. It was in fact, never tried, because the chairman prevented it from being tried, and to pretend that there has been here the free exercise by the jury of their right to acquit on the merits need only be stated to be rejected. The answer of the foreman of the jury clearly shows that they understood that he was directing them to acquit, and that seems also to have been the opinion of the clerk of the peace, for he indorsed the indictment with regard to count No. 1: "Verdict not guilty by direction".

As I have said, the Attorney-General contends that in this case there has been no trial at all, and, therefore, he submits that the order of discharge should be quashed and this court should order that the case should be heard according to law. That it was not heard according to law in one sense is perfectly true, for the proceedings of the chairman were irregular from beginning to end and his action prevented any evidence from being given. Again, in one sense it is true to say that there has been no trial, but this court has no power to order a re-trial in any case unless there has been what in law can properly be described as a mistrial and consequently a nullity. Moreover, though there have been cases in which the court has ordered a venire de novo because of a mistrial, we have not been referred to a single case, nor can one be found, where this has been done after a verdict of Not Guilty has been recorded. The Attorney-General relied particularly on *Re v. Wandsworth JJ. Ex p. Read* (1). The headnote in the Law Reports, which conveniently summarises the decision, is:

"Where there has been a denial of natural justice before a court of summary jurisdiction, resulting in the conviction of a defendant, his remedy is not by Case Stated or appeal to quarter sessions, but by application to the High Court for an order of certiorari to remove and quash the conviction."

(1) 106 J.P. 50; [1942] 1 All E.R. 56; [1942] 1 K.B. 281.

That, it will be observed, was not only a case dealing with a court of summary jurisdiction, but also was one in which there had been a conviction, and the books are full of cases where this court has interfered and quashed convictions where there has been a denial of what is for convenience called natural justice.

There is, however, no case to be found in the books in which the court has ever ordered a re-trial after a verdict of Not Guilty. Our attention was called to *Rex v. Marsham. Ex p. Pethick Lawrence* (1) which was followed in *Bannister v. Clarke* (2). In the first case a person was convicted of assaulting a police constable and by inadvertence the constable gave his evidence unsworn. On discovering this fact the magistrate re-heard the case, had the witness sworn, and came to the same conclusion and convicted. It was held that, as the first proceedings were a mere nullity, no plea in the nature of autrefois convict could be set up because the applicant had never been in peril on the first hearing owing to the irregularity. Here we are unable to say that there has been anything in the nature of a mistrial. To constitute a mistrial the proceedings must have been abortive from beginning to end so that, had the record been drawn up, the error would have been apparent: *Rex v. Neal* (3). The fact that the jury have acquitted without evidence would not appear on the record. This is what happens whenever counsel for the prosecution offers no evidence. The prisoner is then in charge of the jury and they are directed to return a verdict of Not Guilty, no evidence having been offered. The verdict is received and recorded, and the prisoner is discharged. Suppose counsel for the prosecution in the exercise of his discretion offered no evidence, it would not be open to the prosecutor to come to this court and ask that the case should be sent down for re-trial because he wanted evidence given and did not agree with the course that counsel had adopted. Here the defendant was properly arraigned and the jury sworn to try him, so technically he was in peril, and as they returned a verdict of Not Guilty, however improperly that verdict may have been obtained, this court cannot, as it seems to us, direct a new trial. In *Rex v. Simpson* (4), SCRUTTON, J., said:

"... there never has been a case in which an acquittal by a court of summary jurisdiction has been quashed by certiorari, and, although in some cases judges have acted proprio vigore in making precedents, I do not myself feel disposed to do so in this case."

Nor do we. An acquittal by a jury seems to be a fortiori.

I do not think it necessary to go in detail through the large number of cases which were cited to us. None of them, in my opinion, supports the proposition that we could order a re-trial in this case. The trial was deplorably irregular, but it was not a mistrial in the legal sense. This was obviously a proper case to bring before this court, but for the reasons that I have given it is impossible for us to interfere, and the application must, therefore, be refused.

Application refused.

Solicitors: *Director of Public Prosecutions; C. W. Radcliffe*, clerk to Middlesex County Council (for the justices); *Clifford-Turner & Co.* (for the defendant).

T.R.F.B.

(1) 76 J.P. 284; [1912] 2 K.B. 362.

(2) 85 J.P. 12; [1920] 3 K.B. 598.

(3) 113 J.P. 468; [1949] 2 All E.R. 438; [1949] 2 K.B. 590.

(4) 78 J.P. 55; [1914] 1 K.B. 66, 75.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., SLADE AND PARKER, JJ.)

June 17, 27, 1952

GARDNER v. AKEROYD

Emergency Legislation—Doing acts preparatory to commission of offence—Liability of master for act of servant—Mens rea—Defence (General) Regulations, 1939 (S.R. & O., 1939, No. 927), regs. 55AB, 90 (1).

At the shop of the respondent, a butcher, were found parcels of meat bearing tickets showing the names of the purchasers and the prices, which exceeded the maximum prices prescribed by the Meat (Prices) (Great Britain) (No. 2) Order, 1951, art. 2 and schedule (made under reg. 55AB of the Defence (General) Regulations, 1939. The parcels had been prepared and the tickets attached by an assistant of the respondent during the respondent's absence from the shop and without his knowledge. An information preferred against the respondent, charging him with doing an act preparatory to the commission of an offence against reg. 55AB, contrary to reg. 90 (1) of the Defence (General) Regulations was dismissed by justices.

HELD, that the decision of the justices was right. Although the order of 1951 contained an absolute prohibition against sale in excess of the maximum price, so that, if the parcels had been delivered to the customers, the respondent would have been vicariously liable for the act of his assistant in breach of the absolute prohibition, reg. 90 (1) did not import an absolute prohibition against doing an act preparatory to such sale, and in the absence of mens rea, the respondent was not liable for the contravention of the regulation by his assistant.

Dicta of ATKIN, J., in *Mousell Bros. v. London & N.W. Ry.* (1917) (81 J.P. 305) and LORD GODDARD, C.J., in *Harding v. Price* (1948) (112 J.P. 189, 190), applied.

CASE STATED by Morecambe and Heysham justices.

On Jan. 22, 1952, at a court of summary jurisdiction sitting at Morecambe and Heysham, informations were preferred by the appellant, an enforcement inspector of the Ministry of Food, against the respondent, Akeroyd, and one John Mugliston that they did acts preparatory to the commission of an offence against reg. 55AB of the Defence (General) Regulations, 1939, in that they entered on tickets, for the purpose of selling meat by retail, prices exceeding the maximum applicable under art. 2 of the Meat (Prices) (Great Britain) (No. 2) Order, 1951, contrary to the said order and to reg. 55AB and reg. 90 (1) of the Defence Regulations. For the appellant it was contended that the offences admittedly committed by Mugliston were committed in the performance of duties delegated by the respondent to him, and that the respondent was liable for the offences committed by his servant, whether he was himself aware of them or not. For the respondent it was contended that he took no part in the cutting, weighing, pricing, or ticketing of the meat; that he gave no directions as to those operations; that he was absent from the shop at all material times; and that he would have priced several of the orders differently. The justices, being of the opinion that the respondent did not do any act preparatory to the commission of the offences alleged, dismissed the informations.

J. P. Ashworth for the appellant.

R. J. S. Harvey for the respondent.

Cur. adv. vult.

June 27. The following judgments were read.

PARKER, J.: This is an appeal by way of Case Stated from a decision of justices for the borough of Morecambe and Heysham dismissing thirty-three informations preferred by the appellant, an enforcement inspector of the Ministry of Food, against the respondent, alleging that he did acts preparatory to the commission of an offence against reg. 55AB of the Defence (General) Regulations,

1939. This case raises again the question how far and in what circumstances a master is vicariously liable for an offence committed by his servant.

The respondent carried on business at a shop in Morecambe as a butcher, and employed one Mugliston as an assistant at the shop. On Nov. 1, 1951, two inspectors of the Ministry of Food visited the shop and found some forty-one parcels of meat made up ready for delivery to customers and bearing price and name tickets. A check of the parcels revealed that in the case of thirty-three of the parcels the ticket disclosed overcharges, the total overcharge amounting to £1 5s. 6½d. in respect of meat the maximum price of which was £9 4s. 2½d. under the Meat (Prices) (Great Britain) (No. 2) Order, 1951 (S.I., 1951, No. 1313) made under reg. 55AB of the regulations. The parcels and tickets had been prepared by Mugliston in the absence from the shop of the respondent. The respondent had left it to Mugliston to cut up and weigh the meat, and price the parcels. Article 2 of the aforementioned order provided that:

"No person shall sell or buy by retail any meat at a price exceeding the maximum price applicable in accordance with the schedule to this order."

It is clear, therefore, that, if the parcels had been delivered, offences would have been committed. Regulation 90 (1) of the Defence (General) Regulations, 1939, makes it an offence to do any act preparatory to the commission of an offence against any of the regulations, and, accordingly, the respondent and Mugliston were charged with that offence in respect of each of the parcels. Mugliston was convicted and does not appeal, but the informations against the respondent were dismissed, the justices evidently being of opinion that he was not vicariously liable for the offence committed by his servant.

Whether or not a master is so liable depends on the true application to the facts of the case of the principle laid down by ATKIN, J., in the passage so often quoted in *Mousell Brothers v. London & North Western Ry.* (1), where he said:

"I think that the authorities cited by my Lord make it plain that while prima facie a principal is not to be made criminally responsible for the acts of his servants, yet the legislature may prohibit an act or enforce a duty in such words as to make the prohibition or the duty absolute; in which case the principal is liable if the act is in fact done by his servants. To ascertain whether a particular Act of Parliament has that effect or not regard must be had to the object of the statute, the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom it would in ordinary circumstances be performed, and the person upon whom the penalty is imposed."

It is, I think, clear that, if the parcels had been delivered, the respondent would have committed the full offence of selling meat at a price exceeding the maximum price contrary to art. 2 of the order above referred to. The prohibition in that article is absolute, and it would have been no answer for the respondent to show that this had been done in his absence and without his knowledge and intent. It is contended on behalf of the appellant that the words in reg. 90 (1) equally import an absolute prohibition against doing an act preparatory to such a sale.

In considering the validity of this contention, it is important to consider the general rule referred to by LORD GODDARD, C.J., in *Harding v. Price* (2), where he said:

"The general rule applicable to criminal cases is *actus non facit reum*

(1) 81 J.P. 305; [1915] 2 K.B. 836, 845.

(2) 112 J.P. 189, 190; [1948] 1 All E.R. 283, 284; [1948] 1 K.B. 695, 700.

nisi mens sit rea, and I venture to repeat what I said in *Brend v. Wood* (1): 'It is, in my opinion, of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that, unless a statute, either clearly or by necessary implication, rules out mens rea as a constituent part of a crime, the court should not find a man guilty of an offence against the criminal law unless he has got a guilty mind'. In these days when offences are multiplied by various regulations and orders to an extent which makes it difficult for the most law-abiding subjects in some way or at some time to avoid offending against the law, it is more important than ever to adhere to this principle."

Prima facie, therefore, the respondent commits no offence unless mens rea is present. Do the words constituting the offence expressly or impliedly rebut that presumption? They certainly do not do so expressly, nor, in my view, do they do so impliedly. Regulation 90 (1), as amended by Order in Council dated Aug. 7, 1940 (S.R. & O., 1940, No. 1441), provides as follows:

"Without prejudice to the operation of s. 5 of the Summary Jurisdiction Act, 1848, and s. 8 of the Accessories and Abettors Act, 1861, any person who attempts to commit, conspires with any other person to commit, or does any act preparatory to the commission of, an offence against any of these regulations, shall be guilty of an offence against that regulation punishable in like manner as the said offence."

So far as the two sections there referred to are concerned, knowledge and intent are necessary ingredients to constitute an offence. So far as an attempt is concerned, there again knowledge and intent are clearly necessary, while a conspiracy consists of an agreement to do an act which constitutes the substantive offence. In their context, therefore, it would be odd if the succeeding words imposed an absolute prohibition. Moreover, an act done immediately and not merely remotely connected with the commission of an offence constitutes an attempt, and, accordingly, the act which constitutes merely an act preparatory to the commission of an offence will be an act further back in the sequence of acts leading up to the substantive offence. If mens rea is necessary in the case of an attempt, then it would, one would have thought, have been all the more necessary in the case of the doing of an act preparatory to the commission of an offence. Further, whether or not such an act is an act preparatory to the commission of an offence must, it seems to us, depend on intent. The purchase of a box of matches might or might not be an act preparatory to the commission of an offence of arson according to the circumstances and the intent.

The matter can also be approached by considering whether from the point of view of the protection of the public it is necessary to import an absolute prohibition. As was pointed out by DEVLIN, J., in *Reynolds v. G. H. Austin & Sons, Ltd.* (2):

"It may seem on the face of it hard that a man should be fined, and, indeed, made subject to imprisonment, for an offence which he did not know he was committing, but there is no doubt that the legislature has for certain purposes found that hard measure to be necessary in the public interest. The moral justification behind such laws is admirably expressed in the following words of DEAN ROSCOE POUND in his book, *THE SPIRIT OF THE COMMON LAW*: see L.Q.R., vol. 64, p. 176: 'Such statutes are not meant to punish the vicious will but to put pressure upon the thoughtless and

(1) (1946), 110 J.P. 317, 318.

(2) 115 J.P. 192, 198, 199; [1951] 1 All E.R. 606, 611, 612; [1951] 2 K.B. 135, 147.

inefficient to do their whole duty in the interest of public health or safety or morals'. Thus, a man may be made responsible for the acts of his servants or even for defects in his business arrangements, because it can fairly be said that by such sanctions citizens are induced to keep themselves and their organisations up to the mark. Although in one sense the citizen is being punished for the sins of others, it can be said that, if he had been more alert to see that the law was observed the sin might not have been committed. If a man is punished because of an act done by another, whom he cannot reasonably be expected to influence or control, the law is engaged, not in punishing thoughtlessness or inefficiency and thereby promoting the welfare of the community, but in pouncing on the most convenient victim."

By treating art. 2 of the order as creating an absolute prohibition, butchers, to adopt the words of *DEVLEN, J.*, are "induced to keep themselves and their organisations up to the mark", and I see no necessity from the point of view of the protection of the public in going further and reading the doing of an act preparatory to the commission of an offence against art. 2 as importing an absolute obligation. Indeed to do so would lead to the absurd result that, if the respondent had arrived back in the shop before the parcels had been dispatched and had prevented their dispatch, he would nevertheless have been guilty of the offence charged. In this connection I would quote further from the judgment of *DEVLEN, J.*, in *Reynolds' case* (1):

"I think it a safe general principle to follow (I state it negatively, since that is sufficient for the purposes of this case), that where the punishment of an individual will not promote the observance of the law either by that individual or by others whose conduct he may reasonably be expected to influence, then, in the absence of clear and express words, such punishment is not intended."

Finally, it may be observed that what is made an offence is the doing of an act preparatory to the commission of any offence against the regulations, which latter offence may or may not be contrary to an absolute prohibition. The words in reg. 90 (1) cannot, as it seems to me, amount to an absolute prohibition in relation to one and not in relation to another substantive offence. To read the words as amounting to an absolute prohibition would lead to the absurd result that a master might be vicariously liable for an act done preparatory to the commission of an offence whereas he might not be so liable for the substantive offence itself.

In my opinion, the justices came to a right conclusion and this appeal should be dismissed.

LORD GODDARD, C.J.: I entirely agree with the judgment of *PARKER, J.*, but, as this case raises, in my opinion, a question of cardinal importance regarding the doctrine of vicarious liability in criminal law, I will briefly express my own opinion. A master who is not particeps in the offence can only be liable criminally for the acts of his servant if the statute which creates the offence does so in terms which impose an absolute prohibition. Where the prohibition is absolute no question of knowledge or intent arises, the state of mind of the perpetrator is immaterial: *Bank of New South Wales v. Piper* (2). But this does not mean that whenever an Act forbids something a master is liable if his servant does the act forbidden. It has to be decided as a matter of construction whether the Act imposes a liability on the master for the act of his servant, and the relevant

(1) 115 J.P. 192, 198, 199; [1951] 1 All E.R. 606, 611, 612; [1951] 2 K.B. 135, 147.

(2) 61 J.P. 660; [1897] A.C. 383.

considerations are to be found in *Mousell's* case (1) cited by PARKER, J. If, for example, an Act forbids a sale of adulterated food, or of goods with a false trade description or at a price in excess of a statutory maximum, the master will be liable notwithstanding that the sale was effected by his servant and without his knowledge, provided only that the sale was in the course of the servant's employment. The seller was the employer, and the offence is complete as soon as the goods are sold. A person can be guilty of an offence if he does an act forbidden, if he aids and abets the commission of the offence, if he conspires with another to commit it, if he attempts to commit it, and, in the case of an offence against the regulations, if he does an act preparatory to the commission of an offence. There is no doubt that the class of offence with which we are now dealing is one for which a master can be held vicariously liable. If a sale had taken place there is no doubt that the respondent could have been and would have to be convicted. To convict a person of aiding and abetting any offence, whether against a statute, these regulations, or at common law, it has to be proved that he at least knew the essential fact or facts constituting the offence: see *Johnson v. Youden* (2).

Leaving aside what it is necessary to prove in a charge of conspiracy to commit an act absolutely prohibited, we now come to the offences of attempting and of doing an act preparatory to the commission of an offence against the regulations. I am by no means clear as to the difference between these two offences. The test as to what acts constitute an attempt was laid down by the Court for Crown Cases Reserved in *Reg. v. Eagleton* (3) in these words:

" Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are . . . "

This has been followed as a safe guide by the Court of Criminal Appeal in numerous cases, of which *Rex v. Robinson* (4), *Rex v. Woods* (5), and *Rex v. Bloxham* (6) are good instances. As these cases point out, it is sometimes difficult to determine whether an act is immediately or remotely connected with the crime of which it is alleged to be an attempt, and it may, therefore, be that it is intended to meet this difficulty by using the words " an act preparatory to the commission of an offence " and so to embrace acts which are only remotely connected with the commission of an offence. This may be desirable and necessary in time of war, but I venture to express the hope that it may be considered by the appropriate authority whether this should be continued in time of peace as it is certainly extending criminal liability as regards these existing regulations beyond what exists in regard to other crimes, whether they be common law or statutory offences. One thing must, I think, be certain, and that is that these words are intended to apply to what the law would regard as something less than an attempt.

Now, applying the doctrine laid down in *Reg. v. Eagleton* (3), I should have no hesitation in holding that the servant in this case was guilty of, and could properly have been charged with, an attempt as the facts proved were clearly immediately connected with what would have been a substantive offence had not the enforcement officer intervened before the goods had been actually sold.

(1) 81 J.P. 305; [1915] 2 K.B. 836, 845.

(2) 114 J.P. 136; [1950] 1 All E.R. 300; [1950] 1 K.B. 544.

(3) (1855), 19 J.P. 546, 549; Dears C.C. 376, 515, 538.

(4) 79 J.P. 303; [1915] 2 K.B. 342.

(5) (1930), 143 L.T. 311.

(6) (1943), 29 Cr. App. R. 37.

Does, then, this doctrine of vicarious liability extend to an attempt, for, if it does not, it cannot apply to a mere preparatory act. That it is a necessary doctrine for the proper enforcement of much modern legislation none would deny, but it is not one to be extended. Just as in former days the term "odious" was applied to some forms of estoppel, so might it be to vicarious liability. It makes a person guilty of an offence actually committed by another when he may have no knowledge that it was being committed or may have done his best to prevent it. There is no case to be found in the books where it has been applied to an attempt, and, for my part, I refuse so to extend and apply it. Were it to be applied, the consequences might be startling and unjust in the highest degree. For, once a servant had done an act amounting to an attempt, his master would be vicariously liable though he had intervened and frustrated the commission of the substantive offence. Had the present respondent discovered before the officer arrived what his servant had done and immediately removed the price tickets and summarily discharged him, it could still be said, if the doctrine applied, that he was guilty. To meet this it is said that in such a case there would be no prosecution. That is no answer. The question, and the only question, is: Has the respondent committed an offence? If an offence is complete, the doctrine applies if the statute is one which calls for its application, but I see no ground for holding that because it will apply to a completed offence it must apply equally to an attempt and every reason for holding that it does not. Of course, if the master is a party to the attempt no question of vicarious liability arises. He is just as guilty as the servant. It is with vicarious, and not primary, liability that we are dealing, and, if the doctrine does not apply to an attempt, still less does it apply to the vague and unsatisfactory offence of doing a preparatory act. The justices were right and I agree that the appeal should be dismissed.

SLADE, J.: I entirely agree with both the judgments that have been delivered.

Appeal dismissed.

Solicitors: *Treasury Solicitor* (for the appellant); *Hiscott, Troughton & Page*, agents for *Bannister, Bates & Son*, Morecambe and *Heysham* (for the respondent).

T.R.F.B.

COURT OF APPEAL

(SIR RAYMOND EVERSHED, M.R., BIRKETT AND ROMER, L.JJ.)

May 28, 29, July 4, 1952

MINISTRY OF HEALTH v. STAFFORD CORPORATION

National Health Service—Hospital—Transfer to Minister—"Hospitals vested in a local authority"—Reversionary interest in freehold of hospital premises—National Health Service Act, 1946 (9 and 10 Geo. 6, c. 81), s. 6 (2).

From 1907 onwards the S. corporation used as an isolation hospital certain premises which it owned in fee simple. On May 27, 1943, a joint hospital board, constituted under the Ministry of Health Provisional Order Confirmation (Mid-Staffordshire Joint Hospital District) Act, 1938, by agreement with the corporation acquired a tenancy of the premises for ten years from Oct. 1, 1941, with an option to extend the tenancy for a further period of ten years. Immediately before July 5, 1948, the "appointed day" under the National Health Service Act, 1946, the premises were being used by the joint hospital board as an isolation hospital. As the board came within the definition of "local authority" in s. 79 (1) of the Act

of 1946, under s. 6 (2) of the Act the term of years held by them were transferred to and vested in the Minister of Health on July 5, 1948. On the question whether the freehold interest of the corporation, who were also a local authority within s. 79 (1), also vested in the Minister under s. 6 (2)

HELD: the word "vested" in the phrase "all hospitals vested in a local authority" in s. 6 (2) of the Act of 1946 indicated the ownership of a proprietary interest as part of a hospital undertaking, and the sub-section was concerned only with the interests which, immediately before the appointed day, belonged to a local authority which was carrying on a hospital and providing hospital services; as the corporation were not carrying on a hospital or providing hospital services at the material time, their reversionary interest in the hospital premises was not within the scope of the sub-section; and, therefore, it did not vest in the Minister under the Act.

Semble: the words "all hospitals" in s. 6 (2) do not include legal or equitable interests in the land occupied by the hospital premises, but only refer to hospital activities as distinct from the premises in which such activities are carried on and a reversionary interest therein.

Decision of *DANCKWERTS, J.*, ante, page 205; reversed.

APPEAL by defendants from an order of *DANCKWERTS, J.*, dated Mar. 4, 1952, and reported ante, page 205.

By an agreement, dated May 27, 1943, and made between the defendant corporation and the Mid-Staffordshire Joint Hospital Board, the corporation granted to the board a tenancy of premises, which they held in fee simple and had used as an isolation hospital, for a term of ten years from Oct. 1, 1941, for use as an isolation hospital, and until July 5, 1948 (the "appointed day" under the National Health Service Act, 1946), the board used the premises as an isolation hospital. On a summons by the Ministry of Health to determine whether, on the true construction of the National Health Service Act, 1946, the premises were, on July 5, 1948, transferred to and vested in the Minister of Health, both as to the leasehold interest and the fee simple reversion, or only as to the leasehold interest, *DANCKWERTS, J.*, held that the effect of s. 6 (2) of the Act was to transfer to the Minister all the interests in the hospital which, immediately before the appointed day, were vested in a local authority, and, therefore, both the fee simple and the term of years held respectively by the corporation and the board were thereby transferred to and vested in the Minister.

Cross, Q.C., and *J. V. Nesbitt* for the corporation.

The Attorney-General (Sir Lionel Heald, Q.C.), and *Denys B. Buckley* for the Ministry of Health.

Cur. adv. vult.

July 4. **SIR RAYMOND EVERSHERD, M.R.:** I have had the advantage of seeing the judgment which has been prepared by *ROMER, L.J.* I entirely agree with it and have nothing that I wish to add.

BIRKETT, L.J.: I, too, have had the same opportunity, and I, too, agree and have nothing to add.

ROMER, L.J., read the following judgment. The question for determination in this case is whether the freehold interest in the site of a hospital in Stafford known as the Tithe Barn Hospital has become vested in the Minister of Health by reason of the passing of the National Health Service Act, 1946. *DANCKWERTS, J.*, has answered this question in the affirmative, and the defendant corporation, who were the owners in reversion of the freehold immediately before the appointed day under the Act (July 5, 1948), have appealed against his decision.

The site of the hospital was acquired by the corporation under the Stafford Corporation Act, 1880. From the date of its acquisition until 1907 the site remained vacant, but in that year the corporation erected on it and, until the

agreement hereinafter mentioned, maintained there an isolation hospital. On Dec. 22, 1938, there was passed the Ministry of Health Provisional Order Confirmation (Mid-Staffordshire Joint Hospital District) Act, 1938. This Act formed a number of constituent districts (which included the borough of Stafford) into a united district called the Mid-Staffordshire Joint Hospital District for the purpose of the provision of hospital accommodation for persons in the constituent districts who were suffering from infectious diseases other than smallpox, and set up a joint board which was to be known as the Mid-Staffordshire Joint Hospital Board (hereinafter referred to as "the board"). After the passing of the Act of 1938 the corporation were precluded (by reason of s. 7 (1) of the Public Health Act, 1936) from discharging in their district any functions of the board, but by virtue of para. 22 of the order of the Minister which is set out in the schedule to the Act of 1938 they were, in effect, authorised to continue the Tithe Barn Hospital until a hospital provided by the board was ready for the reception of patients. The corporation acted in pursuance of this authority until 1943, when they were requested by the board to lease the hospital to them. Accordingly, by an agreement dated May 27, 1943, the corporation demised to the board the land in Tithe Barn Road together with the isolation hospital and ancillary buildings erected thereon and the fixtures and fittings therein mentioned for the term of ten years from Oct. 1, 1941, at the yearly rent of £320. The board covenanted (inter alia) to maintain and use the hospital as an isolation hospital for the reception of persons suffering from infectious diseases other than smallpox. The agreement gave the board an option of leasing the hospital for a further ten years at the expiration of the demised term. From the date of the said agreement until July 5, 1948, the board maintained and used the property as an isolation hospital as provided by the agreement. It is not disputed that on that day the property vested in the Minister for the residue of the term granted by the agreement, since the board in whom that term was vested immediately before the appointed day were a local authority within the definition of that expression contained in s. 79 (1) of the National Health Service Act, 1946.

The question is, as already stated, whether the freehold reversion in the property also vested, and this turns on certain provisions of the Act of 1946 to which it will now be convenient to refer. Section 1 reads as follows:

"(1) It shall be the duty of the Minister of Health (hereafter in this Act referred to as 'the Minister') to promote the establishment in England and Wales of a comprehensive health service designed to secure improvement in the physical and mental health of the people of England and Wales and the prevention, diagnosis and treatment of illness, and for that purpose to provide or secure the effective provision of services in accordance with the following provisions of this Act. (2) The services so provided shall be free of charge, except where any provision of this Act expressly provides for the making and recovery of charges."

Section 6 reads:

"(1) Subject to the provisions of this Act, there shall, on the appointed day, be transferred to and vest in the Minister by virtue of this Act all interests in or attaching to premises forming part of a voluntary hospital or used for the purposes of a voluntary hospital, and in equipment, furniture or other movable property used in or in connection with such premises, being interests held immediately before the appointed day by the governing body of the hospital or by trustees solely for the purposes of that hospital, and all rights and liabilities to which any such governing body or trustees

were entitled or subject immediately before the appointed day, being rights and liabilities acquired or incurred solely for the purposes of managing any such premises or property as aforesaid or otherwise carrying on the business of the hospital or any part thereof, but not including any endowment within the meaning of the next following section or any rights or liabilities transferred under that section. (2) Subject to the provisions of this Act, there shall also, on the appointed day, be transferred to and vest in the Minister by virtue of this Act all hospitals vested in a local authority immediately before the appointed day, and all property and liabilities held by a local authority, or to which a local authority were subject, immediately before the appointed day, being property and liabilities held or incurred solely for the purposes of those hospitals or any of them or for the purpose of securing accommodation for persons in the area at any hospital not vested in the authority . . . (4) All property transferred to the Minister under this section shall vest in him free of any trust existing immediately before the appointed day, and the Minister may use any such property for the purpose of any of his functions under this Act, but shall so far as practicable secure that the objects for which any such property was used immediately before the appointed day are not prejudiced by the provisions of this section."

By s. 79 (1) :

"... 'hospital' means any institution for the reception and treatment of persons suffering from illness or mental defectiveness, any maternity home, and any institution for the reception and treatment of persons during convalescence or persons requiring medical rehabilitation, and includes clinics, dispensaries and out-patient departments maintained in connection with any such institution or home as aforesaid, and 'hospital accommodation' shall be construed accordingly . . . 'property' includes rights . . . 'voluntary' means not carried on for profit and not provided by a local or public authority."

By s. 9:

"(1) For the purposes of the foregoing provisions of this Part of this Act relating to the transfer of property and liabilities, the expression 'hospital' includes, in addition to the premises specified in the definition of the said expression contained in s. 79 of this Act, any clinic, dispensary or out-patient department not maintained in connection with such premises as aforesaid at which treatment by or under the direction of medical or dental practitioners is provided, not being—(a) a clinic or out-patient department maintained by a local education authority or maintained by any other local authority for the care of expectant and nursing mothers and young children; or (b) a clinic, out-patient department or dispensary where medical advice or treatment is ordinarily given by general medical practitioners and not by specialists; and also includes any part of a workhouse within the meaning of the Poor Law Act, 1930, which would, if it were a separate institution, be a hospital as defined by the said s. 79, but save as aforesaid does not include any premises forming part of or ancillary to any institution or undertaking of which the main purpose is not therapeutic. (2) Where in connection with a voluntary hospital any premises are used for providing accommodation for paying patients and any profits thereby earned are made available for the benefit of the hospital, the premises shall be deemed for the purposes of this Part of this Act to form part of the hospital. (3) Where—(a) any premises are intended to be used for the purposes of a hospital to which s. 6 of this Act applies but have not been so

used before the appointed day, and work has been done before that day for the purpose of adapting the premises for such use; (b) it is intended to construct on any land new buildings or works which will on completion be used for the purposes of such a hospital as aforesaid, and the work of constructing the buildings or works has commenced before the appointed day; (c) any premises used for the purposes of such a hospital as aforesaid have been destroyed and have not been restored before the appointed day; or (d) any premises normally used for the purposes of such a hospital as aforesaid are, owing to damage or any other cause, not so used immediately before the appointed day; any interests in those premises or in that land or, in the case of destroyed premises, the site thereof held immediately before the appointed day by the governing body of the hospital or trustees or, as the case may be, the local authority in whom the hospital is vested, being interests held solely for the purposes of the hospital, shall be deemed for the purposes of this Part of this Act to be interests in premises forming part of the hospital. (4) Where any premises or land normally used for other purposes are or is temporarily used immediately before the appointed day by a local authority for the purposes of a hospital, the premises or land shall not be deemed for the purposes of this Part of this Act to be a hospital or, as the case may be, to form part of a hospital."

As the Tithe Barn Hospital was not a "voluntary" hospital it vested in the Minister by virtue of s. 6 (2) of the Act and not by virtue of s. 6 (1), and the argument for the Minister is, in brief, that the words in sub-s. (2) "all hospitals vested in a local authority" are sufficient to include, not only the term of years which was granted by the corporation to the board (a local authority), but also the freehold reversion which was vested in the corporation (another local authority). In his judgment DANCEWERTS, J., after referring to s. 6 (2), said (*ante*, p. 207):

"The first thing which strikes one on reading that sub-section after having also read sub-s. (1) is that, whereas sub-s. (1) refers to 'interests in or attaching to premises', which suggests that the quality of ownership was evidently before the mind of the draftsman when he was dealing with voluntary hospitals, when one comes to sub-s. (2) one finds no reference to interests at all, but a reference to 'all hospitals vested in a local authority'. It would appear that the draftsman of the Act, when he dealt with hospitals belonging to a local authority, if I may use that term, had in mind simply the corporeal existence of the hospital as a building or an activity which was conducted by or on behalf of the local authority, and it does not appear to have occurred to him that the hospital might not be vested solely in the local authority so far as all interests in land were concerned otherwise than for all time in fee simple. It does not appear to have occurred to him that a local authority might be carrying on a hospital on land in which it had only a very limited interest, such as a short term of years. It appears to have been assumed that nobody other than the local authority would be interested in the land on which the hospital stood, and so, if a certain construction were put on the sub-section, it might result in the appropriation of a citizen's property entirely without compensation. If I look at a hospital merely as a building or activity carried on by a local authority immediately before the appointed day, I might find that there was a short leasehold interest vested in the local authority and that, subject to that, the site of the hospital belonged in fee simple to some private person. If I then construe the sub-section as simply vesting the hospital without further

consideration in the Minister without regard to the interests of other persons in the land concerned, it would appear that the sub-section would have the effect of depriving a private person of his fee simple without any provision for compensation."

The learned judge said (*ibid.*, 208) that he could not believe that that was the intention of the sub-section, and expressed the view that what must be vested in the Minister must be

"... a hospital, meaning the site and activities to the extent to which the site or the interests in the site are vested in a local authority."

Then, after considering the respective positions in the matter of the joint hospital board and the corporation, he said (*ibid.*):

"It is a matter which appears to me to be of considerable difficulty. I have taken one step, which is to limit the interests transferred by this sub-section to interests in the land vested in a local authority, and the question is whether I ought to impose a further limitation on the construction of this sub-section. It seems to me that I must apply the sub-section according to the words which are used, and that, if there is any interest in land which is used for the purposes of a hospital immediately before the appointed day, I must regard this sub-section as transferring to the Minister the interests in that land which are vested in any local authority. Therefore, while in some respects the result is rather surprising, I come to the conclusion, invoking the Interpretation Act, that the provisions of this sub-section may apply to two or more local authorities as well as to one. Consequently, it seems to me that, this being land on which the activities of a hospital were carried on immediately before the appointed day, whatever interests in that land were vested in a local authority are transferred by this sub-section to the Minister of Health, and that not only the leasehold term, which was held by the Mid-Staffordshire Joint Board, but also the fee simple interest, which was owned by Stafford Corporation, were vested in the Minister by the provisions of s. 6 (2) of the Act of 1946."

It will be seen that the learned judge, in effect, implied into the earlier part of s. 6 (2) the reference to interests in or attaching to premises which appears in s. 6 (1), but confined such interests to those which belonged to a local authority. If this implication is warranted, it has the result of vesting the sites and structures of "local authority" hospitals in the Minister by virtue of the words "all hospitals" in sub-s. (2) without recourse to the later part of the sub-section which relates to the vesting of "property." If, however, the implication is unjustified, the Minister could not, and does not, contend that the freehold reversion now in question vested in him under the provision relating to "property", for, although the reversion was, undoubtedly, property held by a local authority, it was certainly not held "solely for the purposes of the hospital", and it is only property so held that vests by virtue of that provision.

I will consider first, then, the question of the meaning of the phrase "all hospitals" in the earlier part of s. 6 (2). Does it mean or include physical property, or is it referring only to hospital activities as distinct from the buildings and premises in which such activities were, immediately before the appointed day, being carried on? Inasmuch as the second part of the sub-section deals specifically with

"... all property ... held by a local authority ... immediately before the appointed day, being property ... held ... solely for the purposes of those hospitals ..."

it would seem at first sight that the phrase "all hospitals" in the first part of the sub-section was referable to activities and not to physical premises. This *prima facie* impression gains some support from the fact that in sub-s. (1) (in contrast to sub-s. (2)) the words "premises . . . used for the purposes of a voluntary hospital" are expressly used, and, further, that such words themselves indicate a distinction between property, on the one hand, and the purposes of an enterprise, on the other : and see also sub-s. (4), where that which is to vest in the Minister free of any trust is "property" and not "hospitals". As against this there is in sub-s. (1) (but not in sub-s. (2)) a reference to "premises forming part of a voluntary hospital".

Notwithstanding, however, the impression which, as I have said, derives at first sight from sub-s. (2), it was contended before us by counsel for the Ministry that a reference to the definition of "hospital" in s. 79 (1) of the Act and to some of the provisions of s. 9 leads to a different result. It seems to me, however, that the language of the definition in s. 79 (1) is referable rather to a variety of objects or purposes than to land or buildings. In any event, it cannot be regarded as solely referable to the latter. Then, as to s. 9, sub-s. (1) thereof refers to the subject-matter of the definition of "hospital" in s. 79 (1) as "premises" and makes certain additions to them. The rest of s. 9 (1), however, seems to indicate that the word "premises" itself is being used in a sense indicative rather of activities or of an undertaking than of property and, therefore, does not carry the matter much further. Section 9 (2) provides that

"Where in connection with a voluntary hospital any premises are used for providing accommodation for paying patients and any profits thereby earned are made available for the benefit of the hospital, the premises shall be deemed for the purposes of this Part of this Act to form part of the hospital."

Here the word "hospital" in relation to the availability of profits means, apparently, the "enterprise" and in relation to premises includes, it would seem, both enterprise and property. Section 9 (3) distinguishes clearly between premises, land and buildings, on the one hand, and "hospital" in the sense of activity or enterprise, on the other. Finally, s. 9 (4) again draws a distinction between a hospital in the sense of an enterprise and the land on which that enterprise is carried on. There are other references also to be found in the Act to premises and property and hospitals, but, in my judgment, neither they nor those which I have mentioned disturb what I regard as the natural meaning and effect of s. 6 (2), viz., that there vest in the Minister, first, all hospital activities (including management and control) which were formerly vested in local authorities, and, secondly, all property and rights which had been held by such authorities solely for the purpose of those activities.

It is, however, not necessary to express a concluded view on this question for, even assuming that the words "all hospitals vested in a local authority" in s. 6 (2) include legal and equitable interests in the land and premises on and in which the activities of the hospitals were conducted, I am clearly of opinion that the reversionary interest of the Stafford Corporation in the Tithe Barn Hospital was not within their scope. In my judgment, the word "vested" as used in s. 6 (2) indicates the ownership of a proprietary interest as part of the hospital undertaking. Certain interests which, prior to the appointed day, belonged to a local authority which was carrying on a hospital and providing hospital services were to pass into the ownership and possession of the Minister. It is with those interests, and those alone, that the sub-section was concerned. Such a result is not only strictly and fully in accordance with the language used,

but it is in conformity with the heading to s. 6, which is "Transfer of hospitals to the Minister." The language does not appear to me to be at all appropriate to include a reversionary interest belonging to a local authority which was not itself carrying on a hospital or providing hospital services, and I can see no sufficient warrant for attributing a strained interpretation to the language of s. 6 (2) merely for the purpose of achieving a degree of compulsory and uncompensated confiscation which is unnecessary, on the one hand, and productive of uncertainty and confusion, on the other.

The validity of the Minister's contention that the corporation's reversionary interest in the hospital became vested in him was, during the argument, tested by applying two different hypotheses. The first was the assumption that the corporation had granted a lease of the premises in question for the purposes of a voluntary hospital, and that they were being used as such immediately prior to July 5, 1948. If such had been the position, it is as clear that the term granted to the leasees would have vested in the Minister under s. 6 (1), as it is that the corporation's reversionary interest would not. Nevertheless, if the Minister's argument on s. 6 (2) be right, the reversion would have vested in him thereunder so that the vesting provisions of that sub-section would have the incidental effect of enlarging those of sub-s. (1). The Attorney-General was not disposed to accept this as reflecting the probabilities of the matter and sought to meet the difficulty by suggesting that sub-s. (1) and sub-s. (2) should be treated as wholly isolated from one another and that effect should be given to each without any regard to the other. This treatment of two consecutive sub-sections in an Act of Parliament is one only to be resorted to in case of necessity. No such necessity is to be found here, and, further, s. 9 (3), to which I have already referred, operates indifferently on all hospitals affected by s. 6, both those which are dealt with by s. 6 (1) and those which are the subject of s. 6 (2).

It seems to me, accordingly, that the Minister's contention does not successfully survive the first of the tests which were suggested in argument, nor did it fare any better when subjected to the second. This took the form of an inquiry as to what the position would be if the Stafford Corporation had granted a lease of the premises in question to A. (a private individual), who had then sub-let to the board, and the board were using the premises as a hospital under that sub-lease immediately prior to the appointed day. Would the Minister, in those circumstances, claim that the corporation's freehold reversion vested in him under s. 6 (2), notwithstanding that the leasehold reversion which was vested in A. did not? The Attorney-General was inclined to think that the freehold reversion would not vest, but junior counsel for the Minister thought that it would. I do not myself see how, consistently with the interpretation of s. 6 (2) which the Minister contends is the right one, he could do other than accept the view of junior counsel on this point as correct, and yet it is difficult to suppose that the legislature could have contemplated as a practicable proposition that the Minister should enter into possession of a hospital for a term of years, then relinquish possession for what might be another period of years, and then re-enter for an estate in fee. No such difficulties as these would or could arise if one is content to accept the language of s. 6 (2) as one finds it and to confine its operation to the vesting in the Minister of that which a local authority which was providing a hospital service was capable of transferring, viz., such legal interest in the premises of the hospital as it had.

As an alternative way of presenting the Minister's case it was suggested that certain of the provisions of the Ministry of Health Provisional Order Confirmation (Mid-Staffordshire Joint Hospital District) Act, 1938, demonstrate that the

defendant corporation still retained a sufficiently active part in the management of the hospital in question as to justify the view that in some sense the hospital was vested in them. It was pointed out that under s. 4 (1) and sched. I of the Minister's order, which is set out in the schedule to the Act, the corporation contribute four out of the twenty-seven members who constitute the board, that by para. 11 of the schedule to the Act the corporation are empowered to make orders for the admission of persons to the hospital, and that, by para. 13 and para. 15, they have to contribute financially to the common fund of the board. These features of the Act, however, are common to all the constituent districts which constitute the Mid-Staffordshire Joint Hospital District, and, in my opinion, they have no appreciable relevance to the question whether the corporation's rever-sionary interest which is in issue in these proceedings became vested in the Minister by virtue of the Act of 1946. I have already indicated that, in my opinion, it did not. It is to be borne in mind that the provisions of s. 6 of this Act are of a confiscatory character, and the courts are not disposed to hold that a man—or, as here, a local authority—is dispossessed of his property without compensation in the absence of language which clearly leads to that conclusion. In my judgment, for the reasons which I have endeavoured to express, the language of s. 6 (2) does not lead to that conclusion in relation to the rever-sionary interest of the defendant corporation. It leads, on the contrary, to the conclusion that the corporation's ownership of that interest remained altogether unaffected by the Act. In my opinion, accordingly, this appeal should be allowed.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *T. B. Nowell*, town clerk, Stafford (for the corporation); *Solicitor, Ministry of Health.* F.G.

COURT OF APPEAL

(SOMERVELL, BIRKETT AND HODSON, L.JJ.)

June 10, July 4, 1952

THOMPSON v. MILK MARKETING BOARD

Rates—Agricultural buildings—Bull pens, stores, laboratory, offices—Artificial insemination of cattle—Collection of semen from bulls—Rating and Valuation (Apportionment) Act, 1928 (18 and 19 Geo. 5, c. 44), s. 2 (2)—Local Government Act, 1929 (19 Geo. 5, c. 17), s. 67 (1).

A cattle breeding centre established to assist in the breeding of cattle by artificial insemination consisted of twenty-nine acres of agricultural land, of which eight acres were arable and twenty-one acres were grass, and also of buildings consisting of bull pens, an office block, a laboratory, isolation boxes, and fodder stores. The bulls were normally housed in the bull pens, but on occasion they were let out on the grass land for exercise. The animals consumed the produce of the arable land and the whole twenty-nine acres supplied twenty to twenty-five per cent. of the food required. A charge was made for the insemination of cows which was carried out on the farms of subscribers to the centre.

HELD: the buildings were occupied together with agricultural land and were used solely in connection with agricultural operations thereon, within s. 2 (2) of the Rating and Valuation (Apportionment) Act, 1928, and, therefore, under s. 67 (1) of the Local Government Act, 1929, the occupiers of the centre were not liable to pay rates in respect of the buildings.

CASE STATED by the Lands Tribunal under the Lands Tribunal Act, 1949, s. 3 (4), and R.S.C., Ord. 58B, r. 2.

The Milk Marketing Board were the occupiers of a hereditament described as the Cattle Breeding Centre, Ringsfield, Beccles, which was operated by the board for the benefit of farmers by breeding cattle by artificial insemination. It consisted of about twenty-nine acres of arable and grass land producing about twenty to twenty-five per cent. of the food required by the animals, with buildings in which the animals were normally kept and which occupied an area of 10,704 square feet.

The board contended that the buildings were agricultural buildings within the meaning of s. 2 (2) of the Rating and Valuation (Apportionment) Act, 1928, and as such should be excluded from the valuation list, and the local valuation court upheld this contention. On appeal by the valuation officer, the Lands Tribunal, while finding that the buildings were occupied together with the agricultural land and that the operations carried out on the land were agricultural operations, were of the opinion that none of the buildings was being used solely in connection with those operations and that the land was merely auxiliary to the buildings for the purposes of the activities of the centre, and they restored the hereditament to the valuation list. The board appealed.

Roue, Q.C., and L. A. Blundell for the Milk Marketing Board.

Sir Arthur Comyns Carr, Q.C., and Maurice Lyell for the valuation officer.

Cur. adv. vult.

July 4. The following judgments were read.

SOMERVELL, L.J.: This is an appeal by way of a Case Stated from a decision of the Lands Tribunal. The question is whether a hereditament occupied by the Milk Marketing Board, hereinafter called the board, is an agricultural hereditament within the Rating and Valuation (Apportionment) Act, 1928. The definition is contained in s. 2, which is headed "Provisions as to Agricultural Hereditaments," and reads as follows:

"(1) In this Act the expression 'agricultural hereditament' means any hereditament being agricultural land or agricultural buildings. (2) In this Act the following expressions have the meanings hereby respectively assigned to them—'Agricultural land' means any land used as arable meadow or pasture ground only . . . 'Agricultural buildings' means buildings (other than dwelling-houses) occupied together with agricultural land or being or forming part of a market garden, and in either case used solely in connection with agricultural operations thereon."

If it is an agricultural hereditament it falls to be excluded from the valuation list in accordance with the provisions of s. 67 (1) of the Local Government Act, 1929. The board contend that this is an agricultural hereditament and the local valuation court so decided. On appeal by the valuation officer the Lands Tribunal decided that the buildings in question were not an agricultural hereditament and the board asked for a Case to be stated.

The buildings in question are part of what is described as a "cattle breeding centre" at Beccles. The centre contains in addition twenty-nine acres of agricultural land of which about eight acres are arable and twenty-one acres grass land and two cottages. No question as to the rating of these arises. The centre is one of a number established by the board for the purpose of the collection of semen from bulls to be used for breeding dairy cattle by the method known as artificial insemination. Any farmer can become a member by paying £1. There are 4,029 members. Thirty-six bulls and two "teaser" cows are kept at the centre. There is an average of 360 collections of semen a month. The insemination of the cows is not done at the centre. There were some twenty-six thousand

inseminations in 1949 and some thirty-four thousand in 1950. A fee of 25s. is charged. The centre is in charge of a qualified veterinary surgeon. The staff consists of four clerks, three stockmen, and nine inseminators. When a farmer wishes to have a cow inseminated, one of the inseminators takes the semen to the farm and inseminates the cow. The main part of the buildings consists of bull pens. There is also an office block, a laboratory block, isolation boxes, and fodder stores. Except on rare occasions the collections of semen take place in the building. The grass land is essential to the centre for exercising the bulls. The animals graze the land and consume the produce of the eight acres of arable. These twenty-nine acres supply about twenty to twenty-five per cent. of the total food required.

I will now read the conclusions of the tribunal:

"(11) Although we found that all the said buildings were occupied together with the said agricultural land, and although we regarded all the operations carried out on the said land, that is to say the raising and harvesting of animal food crops and the pasturing and exercising of the animals kept at the centre, as being agricultural operations, we were of opinion that none of the buildings satisfied the test of being used *solely* in connection with those operations. We felt that we ought not to regard the bull pens block (No. 3), with accommodation for thirty-two bulls, as used solely in connection with agricultural operations on so small an area of land as twenty-nine acres; in this connection we regarded the land as merely auxiliary to the buildings for the purposes of the activities of the centre. In our opinion, it was a question of degree and we had in mind that the land produced only twenty to twenty-five per cent. of the food required for the animals housed. It followed that we had to take a similar view of the ancillary buildings (Nos. 4 to 7). In reference to the office block (No. 1) and the laboratory block (No. 2), we reached the conclusion that they also were not used solely in connection with agricultural operations on the said land. (12) Accordingly, we decided that none of the said buildings was an 'agricultural building' within the meaning of s. 2 of the Rating and Valuation (Apportionment) Act, 1928, and ordered that the appeal be allowed and that the hereditament be restored to the valuation list at a gross value of £120 and a rateable value of £97."

In the first place I agree that the operations carried out on the twenty-nine acres were agricultural operations. I also agree that the word "thereon" at the end of the definition means on the agricultural land, which, under the definition, includes pasture. In considering the effect of the word "solely" it is necessary to bear in mind that the agricultural operation in buildings, though in connection with, will frequently, perhaps normally, be an operation different from, that on the land. Cows are put out to pasture on the land and milked in a building. No one, I think, would dispute that such a building was within the definition. The cows are pastured in order that milk may be obtained from them and distributed. It is a combined agricultural operation carried on in part on the land and in part in the building. So, here, the keeping, feeding, and exercising of bulls for the collection and distribution of semen is the object of the centre, carried on in part on the land, in part in the building. The products of a farm, of the combined operations carried on on land and in buildings are normally disposed of in the market. Beasts are sent to be sold in markets or slaughtered for food, corn is sold to be milled, or dairy products are sold to dealers or members of the public. Counsel for the valuation officer submitted that the semen was not sold as a commodity. The insemination of the cows was, he submitted, a service. I

accept this, but I do not think it affords an answer to the problem. A building does not, in my opinion, cease to be an agricultural building because what is there done leads up to sales or services.

In *Parry v. Anglesey Assessment Committee* (1) the application of the definition was considered in relation to a shed on a farm in which a car used both for agricultural and private purposes was stored. Quarter sessions had decided that the use for private purposes was substantial and could not be disregarded under the de minimis principle. The shed was, therefore, held not to be an agricultural building. This was upheld by the Divisional Court. The other purpose there was clearly not in connection with any agricultural operations. Such purposes are clearly excluded by the word "solely".

Coming back to the conclusion of the tribunal, it is clear that it is not based on the de minimis principle. The question is whether, apart from such principle, the definition poses the question, as the tribunal have held, whether the operations in the building are auxiliary to those on the land or vice versa. There is no evidence in the Case of the average amount of feeding stuffs purchased on, for example, dairy farms. It may well in the case of a particular farm vary from year to year. I will assume the average amount is very much below seventy-five per cent. Nevertheless such a test would lead to difficult border-line cases. The wording of the definition is not, I think, very easy to construe, and I appreciate, if I may say so, the arguments for the construction adopted by the tribunal, but I have come to the conclusion that it is wrong. Where, as here, the land is substantial and is used in the way stated as a part of the agricultural purpose to which both land and buildings are solely put, I think the words of the definition are satisfied. One does not have to consider which plays the major part.

We were referred to *Malcolm v. Lockhart* (2) and *Lord Glanely v. Wightman* (3). Those cases dealt with the circumstances in which fees earned by stallions were or were not covered by s. 2 B assessments. On the view which I have formed as to the construction of the definition with which we are concerned they do not I think assist. I would allow the appeal.

BIRKETT, L.J.: The question for determination in this appeal is whether the buildings of the Milk Marketing Board at their centre in Beccles come within the provisions of s. 2 (2) of the Rating and Valuation (Apportionment) Act, 1928, so as to be treated as an agricultural hereditament. The local valuation court thought the buildings were an agricultural hereditament and should be excluded from the valuation list. The Lands Tribunal reversed this decision, and the board appeal to this court. I can quite understand this divergence of view for the decision turns on points of some nicety on which different views can quite easily be taken. The material words of s. 2 are "agricultural land" means arable, pasture or meadow land, and "agricultural buildings" means buildings occupied together with agricultural land and used solely in connection with agricultural operations thereon. The purpose of the centre at Beccles is to provide for the collection of semen from bulls in order to inseminate cows by artificial means. The larger purpose is to breed dairy cattle for the supply of milk. Over four thousand farmers within a radius of fifteen miles from the board's centre have become members and have thus qualified to have their cows inseminated artificially when they so desire. Inseminators are sent out from the centre to the farms for this purpose with the requisite semen collected and prepared at the centre. The buildings (for the purpose of this appeal) are the

(1) 113 J.P. 57; [1948] 2 All E.R. 1060; [1949] 1 K.B. 246.

(2) [1919] A.C. 463.

(3) [1933] A.C. 618.

buildings at the centre in which the bulls are usually kept, and include pens, stores and rooms for the actual collection of the semen.

The land consists of twenty-one acres of grass land and eight acres of arable land. There is no question that this is agricultural land within the meaning of the section. The purpose of s. 2 seems reasonably plain. A simple example would be the use of buildings for milking the cows that graze on the grass land of the farm, or buildings used to store the produce from the land. These would clearly be buildings occupied together with agricultural land and used solely in connection with agricultural operations thereon. In the facts of the present appeal, the land is, undoubtedly, agricultural land, and the tribunal has found that the buildings in question are occupied together with that agricultural land. The crucial question is: Are the buildings occupied together with agricultural land and used *solely* in connection with agricultural operations thereon? It is quite clear that they are not used for any other purpose than the professed purpose of the centre, so the kind of question that arose in *Parry v. Anglesey Assessment Committee* (1) does not arise here. The ultimate question, therefore, would appear to be: Is the professed purpose of the centre, as set out in the earlier part of this judgment, an agricultural purpose on the land? If buildings where cows are milked, for example, are buildings used solely in connection with agricultural operations on the land, it is difficult to see why buildings which are used for the purpose of collecting the semen from the bulls and for no other purpose are not to be treated similarly. The fact that the arable land does not produce all the food for the bulls or that the grass land is used only for tethering the bulls or exercising them cannot alter the fact that the buildings are used solely in connection with agricultural operations on the land. The definition of "agricultural operations on the land" must be wide enough, I think, to include the work at the centre. It would be much too narrow a view to hold that the agricultural operations are to be confined to the growing of food and the use of the grass land and to exclude the work carried on in the buildings. The work of the centre must be considered as a whole when answering the question whether the buildings are used solely in connection with agricultural operations on the land. Nor do I think that because the insemination of the cows takes place away from the centre, the buildings where the semen is collected are thereby taken outside the scope of s. 2. The produce of a farm is commonly sold away from the farm itself, and the fact that the insemination of the cows takes place on neighbouring farms does not seem to me to be an objection to the centre qualifying for exclusion from the valuation list. For these reasons I think that the decision of the Lands Tribunal cannot be supported on the facts of this case, and that the appeal of the Milk Marketing Board should be allowed.

HODSON, L.J., stated the facts and continued: In my judgment, the conclusion of the Lands Tribunal as expressed in para. 11 of the Case is erroneous in point of law. The land is being used for agricultural purposes and is agricultural land, and its extent is not so insignificant that it can be excluded by the application of the *de minimis* rule. It is, in my judgment, immaterial that the percentage of food provided for the animals from the land is relatively low. The buildings are occupied together with the agricultural land and are being used in connection with agricultural operations thereon, since the land is used for the growing of food for the animals.

The remaining question is: Are the buildings *solely* used in connection with agricultural operations thereon? This question was, I think, wrongly answered by the tribunal in the negative. The only case to which our attention was drawn

(1) 113 J.P. 57; [1948] 2 All E.R. 1060; [1949] 1 K.B. 246.

in which the section was considered is the decision of the Divisional Court in *Parry v. Anglesey Assessment Committee* (1). That was a case concerning a shed in which a farmer kept his car, and the question was, the car being a private car sometimes used for agricultural purposes and sometimes for private purposes, whether the shed was used solely in connection with agricultural operations on the land. The Divisional Court affirmed the decision of quarter sessions who had held that the private user of the car was not so slight as to bring into play the *de minimis* principle. LORD GODDARD, C.J., said:

"This . . . Case . . . raises a very short point. The ratepayer, who is a farmer, keeps a motor car, which he uses for a variety of purposes. He uses it for the purposes of his farm and to take his produce to market, and he also uses it for a variety of domestic and social purposes . . . Therefore, the car is not merely a farm waggon or implement, but partly that and partly a private car . . . and s. 2 (2) [of the Act of 1928] defines 'agricultural buildings' as ' . . . buildings . . . occupied together with agricultural land or being or forming part of a market garden, and in either case used solely in connection with agricultural operations thereon' . . . The justices would seem to have come to the conclusion that the car is both a private car and a farmer's car. It was for them to decide as a question of fact whether the use as a private car was so slight and so occasional that the doctrine of *de minimis* might fairly be applied. It is a matter of degree."

That case is not directly in point, but it illustrates the effect of the word "solely" contained in the definition. The decision is based on the finding that the car was sometimes used in connection with something quite distinct from the agricultural operations on the land, namely, the private purposes of the farmer, so that the shed in which the car was housed could not be said to be used solely in connection with any agricultural operation.

Our attention has also been drawn to the speeches in the House of Lords in two cases in which sched. B. and sched. D. of the Income Tax Acts were considered—*Malcolm v. Lockhart* (2), and *Lord Glanely v. Wightman* (3). These cases deal with the occupation of land and do not, I think, give much assistance although the language of LORD WRIGHT in the later case ([1933] A.C. 639 and 640) does, I think, lend some support to the view contended for by the board. He said, in speaking of a stallion:

" . . . I think that the service of the stallion is appurtenant to the soil and a profit of the occupation in every case, so that in this regard it is immaterial whether the service is to the appellant's own mares or whether it is sold to strangers; in the latter case the service is sold from the land and as a product of the land, just as much as bullocks, potatoes, fruit or eggs are sold from the land. Without the appellant's stud farm or some other such stud farm the stallions could not live or exercise their generating functions. The value of these functions is inseparably connected with the occupation of land."

Similarly, the function of the bulls here can properly be said to be inseparably connected with the occupation of the land, and I see no difficulty in regarding the buildings where the bulls are housed as being used solely in connection with the agricultural operations performed on the land. They cannot be said to be used in connection with anything else unless the functions of the centre can be

(1) 113 J.P. 57; [1948] 2 All E.R. 1060; [1949] 1 K.B. 246.

(2) [1919] A.C. 463.

(3) [1933] A.C. 618.

regarded as something separate from the agricultural operations on the land. With all respect to the view taken by the Lands Tribunal, I do not think they can be so regarded, nor do I think that the question is one of degree. The fact that the semen is removed from the bulls on the premises and taken away for injection into the females on other premises does not, to my mind, indicate an activity on the part of the centre separate from the agricultural operation on the land. Farming operations are often not completed on the farm. The thrashing of grain may take place elsewhere, but the barn in which sheaves are stored does not cease to be an agricultural building. The milk parlour remains an agricultural building although the milk is taken away and sold.

The question whether the buildings are auxiliary to the land or the land to the buildings is, in my opinion, irrelevant (subject to the *de minimis* rule) since the section says, not that the buildings must be wholly dependent on the land or vice versa, but that they are to be used solely in connection with the agricultural activities thereon in order to fall within the definition. In my judgment, these buildings do fall within the definition of an agricultural hereditament contained in the section and I would allow the appeal.

Appeal allowed.

Solicitors: *Ellis & Fairbairn* (for the board); *Solicitor of Inland Revenue* (for the valuation officer).

G.F.L.B.

COURT OF APPEAL

(SOMERVELL, DENNING AND ROMER, L.JJ.)

July 14, 1952

MCINTOSH (INSPECTOR OF TAXES) *v.* MANCHESTER CORPORATION

Income Tax—Industrial building allowances—“Cutting”—Excavation of land by water undertaking—Income Tax Act, 1945 (8 and 9 Geo. 6, c. 32), s. 14 (1) (b), and proviso.

By Part I of the Income Tax Act, 1945 (now Chapter I of Part X of the Income Tax Act, 1952) certain allowances were given in respect of capital expenditure incurred on the construction of buildings or structures which were to be industrial buildings or structures. Section 14 (1) (b) provided that references in Part I of the Act to expenditure incurred on the construction of a building or structure did not include any expenditure incurred on “preparing, cutting, tunnelling or levelling any land”. By a proviso expenditure on preparing land to receive the foundations of a building or structure, being work which might be expected to be valueless when the building or structure was demolished, was not excluded, unless it was work which “consists of cutting or tunnelling”. Manchester Corporation incurred capital expenditure on its water undertaking, which was admittedly an industrial building or structure, but the part of the expenditure which related to the excavation of land for extending reservoirs, deepening flood channels, making a new weir and settling pools, and constructing an aqueduct, was disallowed for the purpose of claiming an annual allowance on the ground that the work was “cutting” and so was excluded by s. 14 (1) (b).

HELD: the word “cutting” in s. 14 (1) (b) and the proviso meant excavating the land in any way, and was not confined to excavation in the nature of making a cutting through land; and, accordingly, the work in question was “cutting” within the paragraph and proviso and the corporation’s claim was properly disallowed.

Decision of VAISEY, J. (*ante*, p. 209), affirmed.

APPEAL by the corporation from an order of VAISEY, J., dated Mar. 5, 1952, disallowing the claim of the corporation to annual allowances under s. 2 of the

Income Tax Act, 1945, on capital expenditure incurred on excavation work in connection with its waterworks undertaking. The corporation contended that the word "cutting" in s. 14 (1) (b) of the Income Tax Act, 1945, and the proviso thereto, referred only to operations which resulted in cuttings in the sense of open ways through land, such as railway cuttings. The Special Commissioners accepted this contention, but VAISEY, J., reversed their decision. The corporation appealed.

Burton, Q.C., and Senter for the corporation.

The Solicitor-General (Sir Reginald Manningham-Buller, Q.C.) and Sir Reginald Hills for the Crown.

SOMERVELL, L.J.: This is an appeal by Manchester Corporation, as taxpayers, against a decision of VAISEY, J. Allowances were claimed by the Manchester Corporation in respect of moneys expended by way of capital expenditure in connection with their supplies of water. The Income Tax Act, 1945, provided for initial and annual allowances in respect of capital expenditure on the construction of industrial buildings and structures, as defined by the Act. The allowance with which we are concerned, under s. 2 (1), is an annual allowance equal to one-fiftieth of so much of the expenditure as was within the Act. It is not disputed that Manchester Corporation and the waterworks, speaking generally, apart from the disputed items, are within the Act. The question is whether certain items claimed fall to be disallowed under s. 14 (1) (b) of the Act. Section 14 (1) reads as follows:

"References in this Part of this Act to expenditure incurred on the construction of a building or structure do not include—(a) any expenditure incurred on the acquisition of, or of rights in or over, any land; or (b) any expenditure incurred on preparing, cutting, tunnelling or levelling any land: Provided that para. (b) of this sub-section shall not apply to expenditure on work done on the land to be covered by a building or structure for the purposes of preparing the land to receive the foundations of the building or structure, being work which may be expected to be valueless when the building or structure is demolished and not being work which consists of cutting or tunnelling."

There is no dispute that the words "work which may be expected to be valueless when the building or structure is demolished" apply with regard to the items in question. The works as a whole consisted of extending reservoirs, deepening flood channels, making a new weir, making settling pools, and constructing an aqueduct. The items which the Special Commissioners had allowed, but which have been disallowed by VAISEY, J., are the amounts of the expenditure attributable to excavating the soil for these works.

Counsel for the Manchester Corporation submits that the cost of this work should be allowed as

"expenditure on work done on the land to be covered by a building or structure for the purposes of preparing the land to receive the foundations of the building or structure."

He further submits that the work did not consist of cutting or tunnelling. The Solicitor-General submits that the work did consist of cutting and tunnelling. The two rival constructions are set out in the judgment of VAISEY, J., as they were submitted to him, and, substantially, submitted to us. He says this (ante, p. 210):

"Counsel for the corporation submits that 'cutting', although he agrees it is a participle of a verb, means making a cutting in the sense in which

'cutting' (a noun) is used, somewhat colloquially as I think, in reference to railway cuttings in contrast with tunnels."

Then he refers to the view taken by the Special Commissioners, who accepted the view that "cutting" meant the cutting of an open way through land. Then he gives his conclusion on the construction of the words, and he says this (*ibid.*):

"In my judgment, the words 'preparing', 'cutting', 'tunnelling' and 'levelling' land are all descriptive of processes applied to land, and do not describe the results or consequences of operating those processes. It is on this short ground that I prefer the unrestricted definition which the commissioners have rejected. The words describe things which are being done and not things which would be produced. Thus 'tunnelling' is not, as described there, making a tunnel, and 'cutting' is not the same as making a cutting. 'Cutting' and 'tunnelling' are really, I think, only an extended way of describing excavating, the former being an operation more or less in a downward direction and the latter an operation more or less horizontal. I do not find any inconsistency between the body of s. 14 (1) and the proviso, when it is observed that the proviso deals with what I may call foundation works for which allowances may be made on a special basis and on special terms."

I agree with that, but I will add a few words of my own on the words of the section. I agree with the Solicitor-General that the general lay-out of the section is designed to exclude expenditure preparatory to the building or structure. It seems also to me clear that "cutting", where it first appears, cannot mean making a cutting, and it is agreed that the words "cutting" and "tunnelling" must have the same meaning in s. 14 (1) (b), where they first appear, as in the proviso. I think also it would be curious if one regarded "cutting" and "tunnelling" as what are popularly described, in the case of railways, as railway cuttings and railway tunnels. It might be difficult to understand why bridges are not also referred to.

If, as counsel for the corporation submitted, the words "preparing the land to receive the foundations of the building or structure" mean excavating—removing the soil—there would be great force in his contention that the last words of the proviso "not being work which consists of cutting or tunnelling" would, on the Crown's construction, in nine cases out of ten take away what had already been given. I do not myself regard those words as apt to describe excavating in the sense of the removal of soil. It seems to me they are apt to cover preparation of the ground, when excavated, for the foundations. In the course of the argument some examples were given which, as it seemed to me, might well be within them—the strengthening of the soil, when excavated, by ballast or concrete—in other words, expenditure on work which might have been held to be, or argued to be, preparatory within the earlier words. That, of course, is precisely the type of subject-matter which one might expect to find dealt with in a proviso, and on this view the latter words "not being work which consists of cutting or tunnelling" are inserted, perhaps *ex abundanti cautela*, to make it clear that excavation of soil simpliciter is excluded from the benefit of the proviso. It was pointed out in the course of the argument that the word "levelling", which occurs in the earlier formula, does not occur at the end of the proviso. The explanation of that would seem to me to be that "levelling" means levelling of the site, and it was apparently thought, having regard to the drafting of the section, at any rate as I construe it, that it could not be suggested that was or could be within the earlier words of the proviso "preparing the

land to receive the foundations of the building or structure". For those reasons I would dismiss the appeal.

DENNING, L.J.: The word "cutting" is sometimes used as a noun to denote the result of work done, as for example, a railway "cutting". At other times it is used as a verb to denote the actual doing of the work, as, for example, "cutting" the first sod. In this section I think it is used as a verb to denote the work of cutting into land. A good illustration is the "cut and cover" by which an aqueduct takes water from Hawes Water to Manchester. The cutting of the trench to take the pipes is "work which consists of cutting" within the section. I agree that the appeal should be dismissed.

ROMER, L.J.: I also agree. A point which carries considerable weight with me is that on the most elementary principles of construction the word "cutting" in s. 14 (1) (b) must have the same meaning when it is used in the operative part of the section as it has in the proviso. In the operative part you find reference to expenditure incurred on cutting land. I should have thought, as **VAISEY, J.**, thought, that that word "cutting" in relation to land can reasonably only mean digging the land or making an incision into the land. To read it, as counsel for the corporation has invited us to read it, as though it had the same meaning as the phrase "making a cutting in the land" is to attribute to the word an unnatural, and, as I think, quite wrong, interpretation. Therefore, when you find that "cutting" should have, as I think it should, in the first part of the section its plain meaning, you must apply that same meaning to the word "cutting" as used in the proviso. If so, there is no doubt the appeal fails. In my view, for that and for the reasons which **SOMERVELL, L.J.**, has given, it does fail. I would only add that there might have been some force in the argument of counsel for the corporation if there was no way of "preparing the land to receive the foundations of the building or structure" which did not involve cutting, but many examples of doing so have been given us. Therefore, there is no force, as I thought myself at one time there was, in that argument. I agree the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Philip B. Dingle*, town clerk, Manchester (for the corporation); *Solicitor of Inland Revenue* (for the Crown).

C.N.B.

CHANCERY DIVISION

(WYNN-PARRY, J.)

May 27, 1952

NORTH-EASTERN GAS BOARD *v.* LEEDS CORPORATION

Gas—Nationalisation—Vesting of assets in area gas board—Undertaking formerly maintained by local authority—Expenses and receipts of undertaking to be paid out of and into general rate fund—Authority directed “to show under a separate heading or division” accounts of their undertakings—Deficit in undertaking’s account on date of property vesting in gas board under Gas Act, 1948—Liability of authority to account to gas board for surplus revenue of undertaking transferred in 1947 to general rate fund—Leeds Corporation (Consolidation) Act, 1905 (5 Edw. 7, c. i), s. 54, s. 337, s. 338.

By the Leeds Corporation (Consolidation) Act, 1905, s. 54, all the receipts of the corporation’s gas undertaking were to be paid into the general rate fund, all expenses in respect of the undertaking were to be paid out of that fund, and the corporation were to “keep as part of their accounts a separate account as in this Act hereinafter provided.” The Act contained similar provisions in regard to other undertakings of the corporation. By s. 337 the corporation were required to “keep their accounts so as to show under a separate heading or division in respect of each of” five named undertakings, including the gas undertaking, certain specified matters, e.g., (a) the expenses and cost of the undertaking, and (b) the interest on moneys borrowed by the corporation and applied for the purposes of the undertaking. Section 338 authorised the creation of a reserve fund in respect of each of the undertakings. For the year ending March 31, 1946, the surplus revenue of the gas undertaking was £93,639 5s., and between that date and Mar. 31, 1947, the corporation transferred that sum, in their accounts, to the credit of their general rate fund. In May, 1947, they transferred to the general rate fund sums amounting to £29,487 18s. 6d., which, between 1941 and 1946, they had set aside in their accounts, from moneys received in respect of their gas undertaking, to meet contributions which might have become due from them under the War Damage Acts, 1941 and 1943, in respect of that undertaking. On May 1, 1949, when the corporation’s gas undertaking vested in the plaintiff gas board under the Gas Act, 1948, the corporation’s account in respect of the undertaking showed a deficit. The gas board claimed the sums of £93,639 5s. and £29,487 18s. 6d., on the ground that the corporation were not entitled to transfer those sums to their general rate fund.

HELD: the object of the direction in s. 337 of the Act of 1905 that the corporation were to show in their accounts under separate headings or divisions the receipts and expenses of their various undertakings was merely to enable the corporation to ascertain the financial position of the undertakings, and there was nothing in s. 54, s. 337, or s. 338, to indicate that the gas undertaking was to be regarded as a creditor or debtor of the general rate fund, according to whether the undertaking was at the time in credit or in debit with the fund, and, therefore, the corporation were entitled to transfer the sums of £93,639 5s. and £29,487 18s. 6d. to their general rate fund and were not accountable for them to the gas board.

Observations of LORD GREENE, M.R., in *Allchin v. Coulthard* (1942) (107 J.P. 191), applied.

ACTION by the North-Eastern Gas Board for (a) a declaration that on Apr. 30, 1949 (i.e., the day immediately preceding the vesting date for the purposes of the Gas Act, 1948), part of the general rate fund of the defendants, the Leeds Corporation, viz., the sums of £93,639 5s. and £29,487 18s. 6d., was held by the defendants for the purposes of their gas undertaking or in their capacity as gas undertakers, and (b) payment of the sums as money had and received by the corporation to the use of the gas board, or, in the alternative, as money due to the gas board under the Gas Act, 1948.

The sums represented, respectively, surplus revenue in respect of the gas undertaking for the year 1945-46 and a reserve fund set aside in the corporation’s

accounts between 1941 and 1946, out of receipts from the undertaking, to meet contributions which might become due from the corporation under the War Damage Acts, 1941 and 1943, in respect of the undertaking. In 1947 the corporation transferred the sums to their general rate fund. On the vesting date under the Gas Act, 1948, the corporation's account in respect of the undertaking showed a deficit.

The gas board contended that, under s. 54, s. 337, and s. 338 of the Leeds Corporation (Consolidation) Act, 1905, the gas undertaking was to be regarded as a creditor or a debtor of the general rate fund, according to whether the undertaking was in credit or in debit with the fund for the time being, and, therefore, the corporation were not entitled to transfer the above sums and were accountable for them to the gas board.

Russell, Q.C., and *J. P. Ashworth* for the gas board.

Sir Andrew Clark, Q.C., and *Denys B. Buckley* for the corporation.

WYNN-PARRY, J.: For many years prior to 1948 the Leeds Corporation carried on a gas undertaking among other municipal undertakings, and by virtue of the Gas Act, 1948, all property, rights, liabilities and obligations of or relating to that undertaking fell to vest under that Act on the vesting date, which was appointed to be May 1, 1949, by the Gas (Vesting Date) Order, 1949 (S.I., 1949, No. 392).

[His Lordship stated the facts and continued:] It is clear that, to succeed in this action, the gas board cannot rely merely on the provisions of the Gas Act, 1948. They have to demonstrate that the corporation had no power to perform these operations at the time when they did so. To consider this aspect of the matter I have to advert to a few sections of the Leeds Corporation (Consolidation) Act, 1905, the special Act which governs the corporation. In relation to their gas undertaking s. 54 of that Act provides:

"All the interest on any principal moneys borrowed by the corporation and applied by them for the purposes of the gasworks undertaking and all other the costs charges and expenses of and incidental thereto on revenue account shall be paid and satisfied out of the city fund and all the rates charges damages penalties and other moneys received by or for the benefit of the corporation on account of revenue in respect of their gasworks undertaking shall be paid and carried to the credit of that fund and the corporation shall keep as part of their accounts a separate account as in this Act hereinafter provided."

Reference is made in that section to "the city fund". As a result of subsequent legislation that fund is now to be described as "the general rate fund", but, as the case has been argued throughout using the phrase "city fund", it is convenient that I should use it for the purposes of this judgment. Section 337 of the Act of 1905 provides:

"The corporation shall keep their accounts so as to show under a separate heading or division in respect of each of the following undertakings (that is to say) The waterworks the gasworks the tramways the electricity and the markets undertakings respectively on the one side all receipts in respect of the particular undertaking and on the other all expenses in respect of the same undertaking such expenses being divided so as to also show in each case the amounts expended in respect of each of the following purposes (that is to say):—(A) The working and establishment expenses and cost of the undertaking; (B) The interest on principal moneys borrowed by the corporation and applied by them for the purposes of the undertaking:

(C) The requisite appropriations instalments or redemption fund payments in respect of such principal moneys as last aforesaid: (D) The extension and improvement (if any) of the undertaking."

Lastly, s. 338 provides:

"(1) Whenever in any year it shall appear from the said accounts that the receipts in respect of any one of the said undertakings exceed in amount the expenses in respect of the same undertaking the corporation may if they think fit set aside in respect of that undertaking such an amount of money as they think reasonable not exceeding the amount of the difference between the said receipts and expenditure for the purpose of providing a reserve fund and such moneys and the resulting income thereof shall be invested in statutory securities and accumulated at compound interest until the fund so formed amounts to the maximum reserve fund for the time being prescribed by the corporation in respect of the undertaking in question but such maximum shall in no case exceed at any one time a sum equal to one-fifth of the aggregate capital expenditure for the time being by the corporation. (2) Such reserve fund shall be applicable to answer any deficiency at any time happening in the income of the undertaking in respect of which the reserve fund is created and the expenses in respect of that undertaking in any year exceeding the receipts in respect thereof for that year or to meet any extraordinary claim or demand at any time arising against the corporation in respect of the said undertaking and so that if the fund is at any time reduced it may thereafter be again restored to the prescribed limits and so on as often as the reduction happens. (3) Whenever the amount in the reserve fund shall reach the maximum so prescribed as aforesaid the annual proceeds thereof shall be treated as receipts arising from the undertaking in respect of which the reserve fund is created and shall be dealt with accordingly."

In regard to the corporation's other undertakings, the Act contains sections which, to all intents and purposes, are the same as s. 54. The result is that all receipts and payments of the various undertakings are paid into and paid out of the one fund, the city fund.

The question which I have to determine lies in the narrowest compass. It is simply whether, on the true construction of those sections, and, particularly, of s. 337, the corporation had the right to perform the operations which they performed, or whether, as counsel for the gas board contends, they were not entitled to do so because the effect of the sections, particularly s. 54 and s. 337, is that each undertaking is to be regarded as a creditor or a debtor of the general fund, according to whether for the time being that undertaking is in credit or in debit with the general fund. Counsel for the corporation submitted that on the true construction of s. 337 there is no obligation on the corporation to keep separate accounts. Their only obligation is to keep their accounts so as to show under separate headings or divisions what is specified in the section. On the other hand, it is to be remembered that in the closing words of s. 54 it is provided that

"... the corporation shall keep as part of their accounts a separate account as in this Act hereinafter provided."

I do not feel that anything substantial turns one way or the other on the question whether or not s. 337 is to be construed as requiring the corporation to keep separate accounts of the undertakings. From the documentary evidence

before me I observe that, in respect of the gas undertaking, they appear to have kept something which might accurately be described as a separate account. I should regret to decide this question on such a point, and I proceed on the assumption that the true meaning of s. 337 is that the corporation are required to keep separate accounts of the activities of the various undertakings. In the next place, I do not feel that the corporation can derive any real help from the circumstance that they are a corporation incorporated by royal charter. As I understand the legislation, they are entitled to do what they have done unless, on the true construction of the relevant sections of the Act of 1905, they are forbidden to do so, and that is the sole question in this action.

Looking at the matter apart from any authority, I should have been inclined to arrive at the conclusion that there is nothing in the Act of 1905 which operates to prevent the corporation from doing what they have done. I can find, on the language of s. 337, nothing which is strong enough to support the submission of counsel for the gas board, on which he based his case, that each undertaking is to be regarded as a creditor or debtor of the city fund. All that the corporation are directed to do is to show in their accounts under a separate heading or division—and I treat that as being separate accounts—the activities of the named undertakings. At once there springs to one's mind an adequate and common-sense reason for that, viz., that, if no such provision were included, it would be impossible to keep track of the financial fortunes of the respective undertakings. Counsel for both parties relied strongly on s. 338, the section authorising the creation of reserve funds as regards the respective undertakings. I agree with counsel for the gas board to the extent that that section can be used with equal force by either side in support of its argument, and, therefore, I do not derive any help from it.

Is there any authority which either helps me or embarrasses me? In a question which is, as this is, one of construction, it is seldom, indeed, that one obtains real help from a decided case, but I must advert to *Allchin v. Coulthard* (1), which was a decision on a question in regard to income tax, because there is a passage in the judgment of LORD GREENE, M.R., which is not merely of the greatest help to me, but which, I think, covers the case which is now before me, unless, as counsel for the gas board submits, the passage is not of general application but is confined to income tax cases. In *Allchin v. Coulthard* (1) the South Shields Corporation paid out of their general rate fund, which consisted partly of untaxed income (viz., the rates collected) and partly of profits from its undertakings duly assessed to income tax, interest on a loan raised for the purposes of their electricity and transport undertakings and general purposes, deducting income tax in the usual way. The corporation claimed, under the provisions of the South Shields Corporation Act, 1935, to treat the assessed profits of the electricity and transport undertakings as part of the assessed profits out of which the interest was paid and to retain the amount of tax paid on those profits. It was held by the Court of Appeal that, by the provisions of the Act of 1935, the profits of the undertakings could lawfully be applied to the payment of the interest on the whole of the loan, and, consequently, those profits as assessed to income tax formed part of the profits brought into charge out of which the interest was paid or deemed to be paid, notwithstanding that it appeared from the accounts of those undertakings, kept separately as required by the Act, that the surplus revenues of those undertakings had been treated as applied to certain specified purposes of those undertakings.

(1) 106 J.P. 216, 220; [1942] 2 All E.R. 39; [1942] 2 K.B. 228; *affd.* H.L. 107 J.P. 191; [1943] 2 All E.R. 352; [1943] A.C. 607.

It is a perfectly justifiable comment that the question raised in *Allchin v. Coulthard* (1) related to income tax, but it is important to see the way in which the matter was approached by LORD GREENE, M.R. He first set out to construe the South Shields Corporation Act, 1935, and said:

"The effect of the relevant sections of the Act of 1935 may be summarised as follows: All receipts and expenditure must be paid into and out of the general rate fund, but, for the purpose of the internal accounts of the borough, separate accounts showing the specified particulars must be kept in respect of each undertaking. This was obviously necessary, since, if the only account kept had been that of the general rate fund, it would have been impossible to ascertain the financial position of the undertakings. The obligation to keep those accounts imposes, however, no sort of restriction on the corporation's way of dealing with the profits of the undertakings, any more than would be the case with an ordinary trading company which, for purposes of convenience, treated different branches of its undertaking as separate entities for accountancy purposes. Section 114 has as its marginal note the words 'application of revenue of undertakings', and the same phrase appears in the preamble to the Act. I cannot attach to that phrase the importance which counsel for the Crown suggest that it bears. It is, in fact, a misdescription of the contents of the section. The section gives no directions as to the application of revenue as such. It merely empowers the corporation, when there is a surplus, to apply sums out of the general rate fund for specified purposes of the undertaking which shows the surplus. It is impossible to say of sums so applied that they are the profits of the undertaking. They are no more the profits of the undertaking than they are the proceeds of the rates. The actual money represented by the surplus revenue of the undertaking does, of course, go to swell the amount standing in the general rate fund; but its identity is lost and it cannot for any relevant purpose be identified with sums which, under s. 114, the corporation elect to apply out of the general rate fund for the purpose of the undertaking. Moreover, there is nothing compulsory about the application and it is not true to say that there is anything in the section which makes it illegal for the corporation to apply the profits of their undertakings for any purpose, including the payment of interest, to which their moneys can otherwise lawfully be applied. There is no need to deal specially with s. 115, which carries the matter no further."

It is conceded that for all material purposes s. 112 of the South Shields Corporation Act, 1935, corresponds to s. 54 of the Leeds Corporation (Consolidation) Act, 1905, and s. 113 of the Act of 1935 corresponds to s. 337 of the Act of 1905. It appears to me that the sole remaining question is: Is the passage from the judgment of LORD GREENE, M.R., to be regarded as of general application, or is it a passage the application of which is in some way to be limited to a question involving income tax considerations? In my view, it cannot be so limited, and it must be regarded as a passage of general application. In the first place, I would point out that the reason which LORD GREENE, M.R., gives for the keeping of separate accounts is that it

"was . . . necessary, since, if the only account kept had been that of the general rate fund, it would have been impossible to ascertain the financial position of the undertakings."

(1) 106 J.P. 216, 220; [1942] 2 All E.R. 39; [1942] 2 K.B. 228; *affd.* H.L. 107 J.P. 191; [1943] 2 All E.R. 352; [1943] A.C. 607.

He says later:

"The actual money represented by the surplus revenue of the undertaking does, of course, go to swell the amount standing in the general rate fund; but its identity is lost and it cannot for any relevant purpose be identified . . ."

Those appear to me to be the reasons given by LORD GREENE, M.R., to lead up to the consideration of the impact on the income tax aspect of the matter of the conclusions formed on the construction of the relevant sections of the special Act. It appears to me that this case is for all material purposes on all fours with that case, and, although I am not prepared to say that I am, strictly speaking, bound by that case, I cannot find any justifiable reason for not applying that reasoning. Further, it will be appreciated, in view of what I have said earlier, that it coincides with the view to which I would myself have come apart from any authority. For these reasons I am of opinion that the corporation were entitled to do what they did do, and that the action fails.

Judgment for the corporation.

Solicitors: *Sherwood & Co.* (for the gas board); *Sharpe, Pritchard & Co.*, agents for *O. A. Radley*, town clerk, Leeds (for the corporation).

R.D.H.O.

CHANCERY DIVISION

(DANCKWERTS, J.)

June 10, 11, 12, 16, 1952

ATTORNEY-GENERAL v. COLCHESTER CORPORATION

Market—Stallage charges—Different charges for resident and non-resident stallholders—Reasonableness.

The corporation were the owners of a market and also of the soil of the street in which it was held. The market, which was held once a week, was of very ancient origin, and in 1684 the corporation had surrendered its rights in the market and received a re-grant. For many years the corporation had charged stallage (i.e., payment for the right to erect a stall on a site in the market), but no charge was provided for in any charter, nor was the amount regulated by statute, statutory order, or custom. The market was not completely covered with stalls and sufficient space was left for traders to sell wares without setting up stalls, and, therefore, traders were not compelled to take stalls, but did so for their greater convenience. In 1939 linear foot frontage as a basis for charges was first introduced by the corporation, and in 1945 a scale of charges on this basis was adopted and published under which traders residing within the borough paid 1s. 3d. per foot, those residing within ten miles of the borough 2s. per foot, and others £1 (reduced in 1949 to 10s.) per foot. The plaintiff claimed that the stallage charges were unreasonable and excessive and sought an injunction restraining the corporation from so charging.

Held: as the stallholders took stalls, not under compulsion by the exclusion of any site from common law market activities, but for their greater convenience at stallage rates published by the corporation of which they were aware, it was a voluntary bargain, and could not be attacked by reason of the amount of the stallage.

Action by the Attorney-General at the relation of one Edgar Hunt (general secretary of the National Market Traders Federation) against the corporation of the borough of Colchester, the owners of a market held in High Street, Colchester. The plaintiff claimed a declaration that the amounts demanded by the corporation by way of stallage—i.e., payment for the occupation of sites

by stalls in the market—were unreasonable and excessive, and he sought an injunction restraining the corporation from charging excessively.

Hunter-Brown for the plaintiff.

Sir Andrew Clark, Q.C., and *J. L. Arnold* for the defendants.

Cur. adv. vult.

June 16. **DANCKWERTS, J.**, read the following judgment. This is an action by Her Majesty's Attorney-General at the relation of a Mr. Edgar Hunt against the corporation of the borough of Colchester. The defendant corporation are the owners of a market held once a week on Saturdays in High Street, Colchester. The plaintiff claims that the amounts now demanded by the corporation by way of stallage—i.e., by way of rent for the occupation of sites in High Street by stalls—are unreasonable, excessive and rank, and asks for appropriate relief, including an injunction against the corporation charging excessive amounts by way of stallage. The corporation, in their defence, allege that not only are they the owners of the market, but also they are the owners of the soil of High Street, Colchester, on which the market is held and the stalls are erected, and they contend that they are entitled to charge such amounts as stallage as they think fit, or, at any rate, such amounts as they think fit in the interests of the inhabitants of the borough. The action, therefore, raises an extremely interesting question on which there is very little definite authority, viz., whether sums required by an owner of a market to be paid for the exclusive occupation of stalls in the market, by virtue of his ownership of the soil on which the market is held, must be limited to reasonable amounts. Two points must be mentioned at once in this connection. First, there is some obscurity on the question whether the corporation owned the soil of High Street otherwise than merely as highway authority. Their title is put forward as remaining vested in them by virtue of the Local Government Act, 1929, s. 32, but, if their ownership now is simply as highway authority, no argument against them has been based on this point. Secondly, there is no allegation that the site of the market is so covered by stalls that sufficient space is not left for sellers of goods to dispose of their goods in the ancient manner customary in markets without the necessity of stalls. Consequently, the case has proceeded on the footing that the corporation have not compelled the market traders to take stalls, and it must be assumed that traders who take sites for stalls do so voluntarily.

The ownership of a market by the corporation of Colchester is very ancient. The first charter among the number which are available is a charter of King Richard I of Dec. 6, 1189 (the year to which the beginning of legal memory is commonly ascribed in the law). This charter does not grant the market and simply forbids the impeding of the market of Colchester by any extraneous market, and it is evident, therefore, that the market had an earlier origin. In 1684 the corporation surrendered the market, and by a charter of Charles II on Nov. 8, 1684, the corporation received a re-grant of their previous markets, fairs and other franchises and privileges, as well as a number of other things. In the charter of 1684 the participation in the market of traders from outside the borough was forbidden, but this exclusion became illegal by virtue of the Municipal Corporations Act, 1835, the relevant provisions of which were repealed and re-enacted by the Municipal Corporations Act, 1882. The corporation claim the right to hold the market on several days in the week, but at present the market is held and has been held for many years past only on Saturdays, though it appears that it is held also on an extra day near Christmas time.

Payments by way of stallage have been received from traders for very many years. The charges, which are for the right to erect a stall on a site in the market as the corporation does not provide any stalls, have been published from time to time, when an alteration has been made in the amounts, and they are collected by an officer employed by the corporation on the day of the market. The method which has been adopted for some time past in the allocation of the sites is somewhat remarkable. A certain number of the traders attend to select sites personally, but the majority employ one or other of two agents, who have their assistants, to lay down on the portion of High Street permitted to be used for the purpose the poles connected with their stalls, so as to reserve a site. As the clock strikes midnight on the night of Friday and Saturday thus begins, the traders or their agents rush forward and place their poles on the ground. It might be supposed that this method was liable to lead to breaches of the peace, but, apparently, no serious trouble occurs.

The maximum number of stalls permitted by the available space is about fifty, but the number depends to some extent on the length of frontage taken by individual stallholders. The depth of the stalls is limited by the corporation in the interests of traffic in the street, four feet six inches being allowed for the tables or similar structures, with a further space for the traders to move round their stalls or to attend to them. But the charges are calculated according to the length of the frontage of the stall facing the foot pavement of the street. From 1819 to 1837 the charge was 2d., irrespective of space, and was levied only on traders who did not reside in the borough. In 1837 there was a fresh schedule of charges, but the rate remained at 2d., and the charges were levied on non-residents only till 1922. In 1922 the charges were increased to 6d. for residents and 1s. for non-residents selling goods other than fish, and for sellers of fish the charges were double in each case. In 1939 charges according to linear foot frontage of sites were introduced and the charges were 4d. per foot for residents and 6d. per foot for non-residents. By a resolution of Dec. 17, 1945, which came into effect on Jan. 12, 1946, a new scale of charge was adopted under which persons residing within the borough were to pay 1s. 3d. per linear foot, persons residing within ten miles from the borough 2s. per linear foot, and persons residing outside that area £1 per linear foot. On July 17, 1948, a requirement of a minimum charge of £4 for the last class was imposed. On July 19, 1949, as a result of representations by members of the National Market Traders Federation, the charge was reduced (as from Aug. 6, 1949) to 10s. per linear foot for the traders resident outside the ten-miles area, and this is the charge now in force in the case of such persons. It should be noticed that the sums mentioned are the charges for each market day, so that an outside trader taking eight feet of frontage every market day would pay about £208 each year. The imposition of the higher charges for traders from outside the borough and the ten-miles area was made by the corporation in 1945-46 deliberately with the object of discouraging the taking of stalls by persons from London and other places outside Colchester because the corporation considered that many of the persons who came from such places were not desirable as traders in the market and their presence in considerable numbers reduced the amount of space available for local traders such as those who brought in their produce from market gardens and the like.

The relator is general secretary of the National Market Traders Federation. The action is by Her Majesty's Attorney-General and not in any sense a representative action on behalf of the members of the federation, but it is evident that the interest of the relator is concerned solely with market traders who come

from outside the borough of Colchester. Mr. Hunt (the relator) alleged in his evidence that only outside traders who dealt in lucrative lines such as dress materials or dresses could make a reasonable profit after paying the present charges for stalls and that the market was not now a well-balanced market because the rates excluded outside traders who dealt in small manufactured commodities such as reels of cotton and toys (whom he termed "the ordinary market trader"). It appeared, however, that when he visited the market in May, 1951, there were some residents within the borough or the ten-miles area who were selling such articles.

A market is the right to hold a concourse of persons for the purpose of buying and selling, and it confers a monopoly on the owner because the setting up of a competing market can be prevented or stopped by an action for disturbance. There are modern statutory markets, but the ancient markets are generally created by royal charter and are franchises. A fair is merely a greater sort of market, usually held less frequently. Tolls are not incident of common right to a fair or market. Accordingly, there must be found some subsidiary grant of the right to take tolls by express mention. The amount of the tolls need not be specified in the grant, and, in the absence of specific mention of an amount, the right will be to take tolls of a reasonable amount. The right to take tolls may be established by prescription. At common law, tolls for goods sold in a fair or market are due from the buyers and not from the sellers, but the difficulty of collecting such tolls must be considerable. It is not surprising that attempts have been made from time to time to establish a right to take tolls from the sellers. In some cases such attempts have been successful; in other cases they have been unsuccessful: see *A.-G. v. Horner* (No. 2) (1). Payments known as stallages or pickages are of a different nature from the franchise or market tolls which were exacted from buyers, or, if custom supported the practice, from sellers, and which were only payable in respect of goods actually bought and sold in the market. The common law right of the public was to come into the market or fair to buy and sell goods, and the public had no right to erect stalls or to place their goods on the ground in the market except for a purely temporary purpose. If a seller attempted to appropriate a portion of the ground to his exclusive occupation, he committed a trespass and could be sued by the owner of the soil, unless he obtained the owner's consent and agreed with him on the payment to be made to him for the privilege or convenience of erecting a stall. This payment was called a "stallage", and, if holes were made in the soil for poles or posts, it was called a "pickage". But it was established that, if a trader erected his stall without previous agreement with the owner of the soil, the owner of the soil might waive the tort and sue in assumpsit on an implied contract: see *Newport Corpn. v. Saunders* (2); but in that case the owner of the soil could only recover the amount fixed by custom, if there was such a sum, or a reasonable payment if there was no fixed sum.

It is settled beyond doubt that the owner of the market or of the soil was under no obligation to provide any stalls or pens or other such conveniences. His duty at common law was limited to providing a space in which buyers and sellers could meet and conduct their trading: see *Brackenborough v. Spalding Urban District Council* (3), in which the House of Lords exonerated a market authority from liability to the widow of a man killed by a steer that escaped from a pen on the ground that the provision of pens was not a duty of the owner of a market. Conversely, the owner of a market owes a duty not to

(1) 77 J.P. 257; [1913] 2 Ch. 140.

(2) (1832), 3 B. & Ad. 411.

(3) 106 J.P. 81; [1942] 1 All E.R. 34; [1942] A.C. 310.

prevent the public exercising their common law rights of resorting freely to the market, and so is liable if he so covers the site of the market with stalls that insufficient room is left for the market to be enjoyed by those who do not wish to take stalls: *Rex v. Burdett* (1). In essence, therefore, the right to stallage payments is different from the right to take ordinary tolls from buyers of goods, being not dependent on any royal grant (or prescription amounting to the same) but created *ratione tenurae* or by virtue of ownership of the soil (including the possession or occupation of a lessee). Stallages may, however, be based on custom, because there may be a custom in the inhabitants of a place, or a particular class of such inhabitants, to erect and occupy stalls in a market or fair, paying a reasonable sum as stallage, or some sum fixed by custom, as the case may be.

The matter is also complicated by the Statute of Westminster the First (3 Edw. I, c. 31), 1275. According to LORD COKE (2 Co. Inst. 219):

"In the troublesome and irregular raigne of Henry III outrageous tols were taken and usurped in cities, boroughs, towns, where faires and markets were kept, to the great oppression of the king's subjects, by reason whereof very many did refrain from the coming to faires and markets, to the hindrance of the common-wealth; for it hath ever been the policy and wisdom of this realm that faires and markets, and specially the markets, be well furnished and frequented."

The statute provides as follows:

"Touching them that take outrageous toll, contrary to the common custom of the realm, in market towns; it is provided, that if any do so in the king's town, which is let in fee farm, the king shall seize into his own hand the franchise of the market; and if it be another's town, and the same be done by the lord of the town, the king shall do in like manner, and if it be done by a bailiff, or any mean officer, without the commandment of his lord, he shall restore to the plaintiff as much more for the outrageous taking, as he had of him, if he had carried away his toll, and shall have forty days imprisonment . . ."

The provisions of this statute are relied on by the relator, and it is said that "toll" in the statute includes every kind of toll, including stallage. As has been indicated, the title to receive stallage is essentially different from that to franchise tolls, and it has been said that the term "toll" strictly does not include "stallage": *Northampton Corp'n. v. Ward* (2). On the other hand, it may be interpreted to include stallage in Acts of Parliament, grants and pleadings: *Bennington v. Taylor* (3), *Duke of Bedford v. Emmett* (4) *Lockwood v. Wood* (5). LORD COKE continues (*ibid.*), in the passage to which I have referred, as follows:

"Tolnet.] Toll. For the generality of the word, see Jehu Web's Case, Lib. 8. Magna Charta, and W.2. whereof, and of the severall kinds thereof, more shall be said in the exposition of the statute of W.2. for that here it is restrained, as hereafter appeareth. Outragious.] That is, either where a reasonable toll is due and excessive toll is taken, or where no toll at all is due, and yet toll is unjustly usurped, for it is an outrage to doe such a common

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That is the end of the quotation. I have quoted the passage from LORD COKE in full because on behalf of the relator it is contended (i) that LORD COKE said that the Statute of Westminster the First applies to tolls of every kind (including stallage) and (ii) that he said that stallage must be reasonable in amount equally with franchise tolls, that is, tolls demandable on the purchase of goods. On behalf of the defendant corporation it was contended that the words used by LORD COKE were limited to tolls which were payable by grant, custom or implied contract, and had no reference to where an express contract was made between the owner of the soil and the stallholder.

In PEASE & CHITTY'S THE LAW RELATING TO MARKETS AND FAIRS (published in 1899), it is said at p. 64:

"The amount due for stallage may be a matter of express or implied agreement; but must in all cases be reasonable; and a market-owner who extorts an unreasonable stallage by compelling people to take stalls and running up their price may be indictable for so doing."

The authority quoted for the statement that the amount of stallage must be reasonable is the Statute of Westminster the First. For the last statement in the passage quoted, *Rex v. Burdett* (1), and RUSSELL ON CRIME, p. 425 to p. 428, are cited. This seems to be a mis-statement of the effect of *Rex v. Burdett* (1), in which the question of a reasonable amount does not appear to have been discussed. Another passage in PEASE & CHITTY'S book, at p. 67, was relied on on behalf of the relator. The authors are enumerating the facts usually to be proved in an action for stallage or pickage, and these include an allegation that

"... the sum claimed is a reasonable sum, and if it be claimed by special agreement, or by custom or prescription, that the agreement was made, or the custom or prescription exists."

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In *Lockwood v. Wood* (2), in which the question to be decided was whether a modern grant created an exemption from stallage, LORD DENMAN, C.J., quoted with approval the passage from LORD COKE on the subject of outrageous tolls and said that it had received judicial confirmation in *Bennington v. Taylor* (3) and decided that exemption from toll in the document in question would include exemption from stallage. In *Bennington v. Taylor* (3), it is important to note, the amount of the stallage seems to have been fixed by immemorial custom, and the question was whether distress could be made for it. In *Duke of Newcastle v. Worksop Urban Council* (4), the question was whether increased tolls charged

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(4) [1902] 2 Ch. 145, 161.

on fair days to persons who were not regular attendants on market days could be claimed by the lord of the manor who had granted a lease of the markets but had reserved the fairs. It was contended that these increased tolls must be fair tolls because they were an addition to the market tolls, but it was held that these increased payments (which were charged for stalls) were stallage payable to the lessees as owners of the soil. FARWELL, J., says ([1902] 2 Ch. 161):

"So long as the lord does not exceed the maximum toll that he is entitled to demand—that is, a reasonable amount when the charter specifies no sum: *Stamford Corpn. v. Pawlett* (1), and it is not suggested that 3d. is unreasonable—he may remit all or a part of the toll to whomsoever he pleases. The reasoning in the case of *Hungerford Market Co. v. City Steamboat Co.* (2) applies, in my opinion, to the present case."

It is plain that in this passage FARWELL, J., was talking about stallage. *Hungerford Market Co. v. City Steamboat Co.* (2) was a case of statutory charges for the use of a wharf and a bridge and a statutory maximum was imposed, and less than the maximum was charged in certain cases. *Stamford Corpn. v. Pawlett* (1) was not a case about stallage; it was the case of a grant of a market, with an express grant of toll, which, of course, implies a reasonable toll (as has been mentioned already).

The statements which I have now reviewed are certainly capable of being construed as imposing a reasonable limit on every kind of toll connected with a market, including stallages recoverable *ratione tenuræ* as the result of express contract. There are, however, statements contained in other legal works and cases which seem to be inconsistent with such a limitation in the case of stallages agreed with an owner of the soil of a market who does not attempt to force the trader to take a stall. In *Northampton Corpn. v. Ward* (3), which was an action of trespass against a butcher who claimed the right to erect a stall in a market owned by a plaintiff who was seised in fee of the close, the court said that a person resorting to the market had no right at common law to erect a stall and must acquire the right by a compensation to the owner of the soil called stallage. And the court quoted with approval a passage in SPELMAN'S GLOSSARY which says that the stallgiator (i.e., the stallholder) must make an agreement for compensation with the owner of the soil. *Rez v. Burdett* (4) was the case of an information against a farmer for extortion because he had taken sums of money from "the market people" for the use of the little stalls in the market. The common law offence of extortion is, apparently (as distinguishable from demanding money by menaces), the taking by a public officer of money from an improper motive and under colour of office when the money is not due at the time it is taken. It was contended that the farmer's conduct was extortion, because the people had not free liberty to sell their wares in the market according to law. It was said by the court that, if the defendant erects several stalls and does not leave sufficient room for the market people to stand and sell their wares, so that for want of room they are forced to hire the stalls of the defendant, the taking of money for the use of the stalls in such case is extortion, but, if the people have room enough clear to themselves to come and sell their wares, but for their further convenience they voluntarily hire these stalls of the defendant, without any necessity compelling them, then there is no extortion, though the defendant takes a fine and rent for the use of them,

(1) (1830), 1 Cr. & J. 57; 148 E.R. 1334.

(2) (1860), 72 J.P. 213; 3 E. & E. 365.

(3) (1745), 2 Stra. 1238; 93 E.R. 1155.

(4) (1697), as reported in 1 Ld. Raym. 148; 91 E.R. 996.

and it is said that, if they will enjoy the convenience of the stalls, they must comply with the defendant's terms. The report continues (1 *Ld. Raym.* 149):

"Therefore this case rather resembles the case of new mills, where the miller is not restrained to any certain toll; but the persons who will have their corn ground there, must comply with the miller's demands; and whatsoever he takes, it is not extortion, because it is the voluntary agreement of the parties."

This seems quite inconsistent with a limit on such charges by reference to what is reasonable. In *GUNNING ON TOLLS*, published in 1833, the same view of the law relating to stallage seems to be taken. On p. 89 it is said:

"As to the amount to which the owner of a fair or market is entitled for stallage and pickage, there are very few authorities. In one of the old books [2 *Shower*, 266], it is said that stallage must be certain: but in the *Northampton* case (1) the court said that if no particular sum is fixed by the custom of the market to be paid for the privilege of having a stall there, the person placing one must agree with the owner for the sum to be paid; and if any sum be fixed by the custom of the market, that alone can be demanded and must be paid."

I was referred to a number of other interesting authorities, but those which I have mentioned seem to me to be the only cases which really bear on the point which I have to decide.

I have to choose between these statements of the law, unless there is some explanation which will make them reconcilable. Such an explanation has been put forward by counsel on behalf of the defendant corporation. He contended that a distinction should be made between the case where the owner of the soil of a market obtains payments from those who wish for their own convenience to obtain exclusive occupation of the site of a stall and the case where the payment to be made for a stall is not ascertained by a voluntary bargain between the parties, but either is settled by custom or an Act of Parliament, or, without some express terms being agreed, is to be implied from the stallholder taking the site of the stall by merely occupying it so that an action in assumpsit would be on an implied contract. It is clear that there is plenty of room for confusion in these matters. For apart from the cases where the erection of stalls and payments to the owner of the soil over a long period have given rise to the inference of a custom, there are so many cases where a maximum or limit on the charges to be made has been imposed by some special Act of Parliament or is regulated by some general Act of Parliament or orders made under an Act of that kind. The existence of a requirement of a reasonable limit in the case of franchise or market tolls and the passing of the Statute of Westminster the First might well cause misleading inferences to be drawn. It is more easily understandable that a condition of reasonableness should be applied to cases where by virtue of the existence of a monopoly the trader has no choice but to pay franchise or market tolls, or tolls can be demanded without question by virtue of some custom, where again the trader could not avoid the payment. In such cases it may well have been desirable to provide more effective remedies "to prevent extortion" (or the extraction of outrageous tolls) by the Statute of Westminster the First. But where the trader is under no obligation to incur the charges except for his greater convenience, as in the case of the voluntary taking of a stall by bargain with the owner of the soil,

(1) (1745), 2 *Stra.* 1238; 93 *E.R.* 1155.

the same considerations do not apply. The case resembles, as was said in *Rez v. Burdett* (1), that of

"new mills, where the miller is not restrained to any certain toll; but the persons who will have their corn ground there, must comply with the miller's demands . . ."

This explanation, therefore, of the apparent conflict of the authorities appeals to me and appears to me to have the merit of logic. The statements of LORD COKE are not wholly free from inconsistency, as it seems to me, if they are read in the extreme sense attributed to them by the contentions on behalf of the relator, and I think that they have been taken to be more general than they were intended to be, so as to be misleading. In the same way the general statement in PEASE & CHITTY's book that the amount due for stallage "must in all cases be reasonable", in my view, requires qualification, and may be due to a misapplication of the statements by LORD COKE. The obiter dictum of FARWELL, J., in *Duke of Newcastle v. Workson Urban Council* (2) is easily understandable as a general statement not wholly accurate in all conditions, as the cases to which he refers for support are not those of stallage demanded *ratione tenuræ*.

My conclusion is, therefore, that in cases where an agreement for stallage is reached between the owner of the soil and the stallholder at rates previously agreed, without unlawful compulsion by the exclusion of any site for common law market activities, it is a voluntary bargain which cannot be attacked by reason of the amount of the stallage. It is plain that in the present case the necessary conditions must be accepted as being operative. The charges payable to the corporation were announced beforehand and were well known to those who elected to occupy stalls, and there is no evidence that sufficient space was not available to any trader who wished to exercise his common law rights for the purpose of selling his goods in the market.

This result makes it unnecessary for me to decide the question whether the charges required by the corporation to be paid were, in fact, unreasonable. I thought it right that the parties should put in the evidence that they had available on this question in case this action should go further and it might be necessary for the court to go into the matter. It was accepted by counsel for the relator that the onus was on the relator to prove that the charges were unreasonable, though it was contended that the onus could be shifted to the corporation by evidence in regard to the profits made by the corporation from the letting of the stalls. An agreed document was put in showing the charges made by a number of market owners in other well-known towns, in some of which a maximum was limited under some statute or order, and in which in quite a number of instances the market owner provided the stalls or stalls and cover for them. These comparisons indicated that, if the charge of 10s. per linear foot frontage made by the defendant corporation in the case of traders from outside the borough and ten-miles limit be taken into consideration, the charges made by the defendant corporation in the case of traders from outside the borough were very much greater than those made by the market owners referred to in the document. Further, the evidence showed that, while the total annual expenditure of the corporation in connection with the market was estimated to be between £150 and £200, very much larger sums were taken by the collection of the stallage charges from the stallholders. For instance, in the year 1950-51 the corporation received £3,574 13s. 9d., of which £2,419 10s. came from traders outside the borough and the ten-miles limit, and £1,155 3s. 9d.

(1) (1697), as reported in 1 Ld. Raym. 148; 91 E.R. 996.

(2) [1902] 2 Ch. 145, 161.

came from those within those limits. It is, no doubt, true that large profits are made which inure for the benefit of inhabitants of the borough who are ratepayers. As I have already mentioned, the relator, Mr. Edgar Hunt, suggested in his evidence that the 10s. per foot charge made it impossible for outside traders, other than those operating in lines in which a high profit is obtained, to make a profit, but no trader was called to substantiate Mr. Hunt's allegations (which appear not to be first-hand) and to prove that by reason of the charges the trader was unable to make a reasonable profit. Nor was there any evidence whatever from any member of the public frequenting the market as a buyer to substantiate Mr. Hunt's allegations that the discouragement of what he called "the ordinary market trader" from outside the borough rendered the market "ill balanced", which, I suppose, means not equipped to meet the demands of the public. There is really no evidence whatever that the market does not provide the services or facilities which a local market is intended to provide for the local population. It may be inferred, perhaps, that the real grievance of the relator is that the class of trader which supports his federation is not able to make in Colchester the profits to which such persons had become accustomed in an earlier period. I have, indeed, felt some difficulty in appreciating the considerations which really ought to decide whether stallage charges are reasonable. Both parties cited in aid the observations of HAMILTON, L.J., in *A.-G. v. Horner* (No. 2) (1), in which he says:

"The justification for the grant of a monopoly of market is that the existence of the market is for the benefit of the public. If the market keeper is not to get his outlay back and something more, he will give up the market, and where will the public be then?"

HAMILTON, L.J., was, of course, in that case referring to the franchise or market tolls. No doubt, the corporation in the present case recovers the amount of the expenses required to maintain the market several times over, but no one has come forward to complain from the general body of the public who frequent the market to purchase goods. It is not suggested that the charges made to local traders are unreasonable. What sort of duty does the corporation owe to traders who come from London to make profits at the expense of the local inhabitants of Colchester? All I will say is that I am not satisfied that in the circumstances of the case the charges made by the corporation are unreasonable.

Judgment for the defendants.

Solicitors: *Beverige & Co.*, agents for *Neal, Scolah, Siddons & Co.*, Sheffield (for the plaintiff); *Sharpe, Pritchard & Co.*, agents for *N. Catchpole*, town clerk, Colchester (for the defendants).

R.D.H.O.

COURT OF APPEAL

(SINGLETON, DENNING AND ROMER, L.JJ.)

June 23, 24, 25, 1952

REG. v. MINISTER OF HOUSING AND LOCAL GOVERNMENT AND ANOTHER. *Ex parte* HOVE CORPORATION

Electricity—Nationalisation—Authorised undertaker a local authority—Property held in capacity as authorised undertaker—Surplus net revenue transferred to general rate fund, but not applicable in aid of local rates—Electricity Act, 1947 (10 and 11 Geo. 6, c. 54), s. 15 (1).

A local authority ("the corporation") owned an electricity undertaking which vested in a board of the British Electricity Authority on Apr. 1, 1948, by virtue of the Electricity Act, 1947. Among the assets of the corporation was a sum of £17,520 9s. 3d. which represented surplus net revenue arising from its electricity undertaking, and which had been transferred to the general rate fund of the corporation under the authority of s. 185 (1) of the Local Government Act, 1933. By reason of the restrictions contained in s. 7 of the Electric Lighting (Clauses) Act, 1899, as amended by s. 43 and sched. V of the Electricity (Supply) Act, 1926, this sum, in the particular circumstances of the corporation, could not be applied in aid of the local rate. On the question whether the money was to be included in the property and rights of the corporation vesting in the British Electricity Authority,

Held: as the corporation could not use the sum in question in aid of the local rate, but only in accordance with the provisions of s. 7 of the Electric Lighting (Clauses) Act, 1899, as amended, it was property held, or rights acquired, by the corporation in their capacity as authorised undertakers, within the meaning of s. 15 (1) of the Electricity Act, 1947, and, accordingly, vested in the British Electricity Authority.

APPEAL by Hove Corporation against an order of the Divisional Court refusing leave to apply for an order of certiorari to remove into the court to be quashed a determination of the Minister of Local Government and Planning (replacing the Minister of Health), under s. 15 (3) of the Electricity Act, 1947, that a sum of money representing surplus net revenue of the corporation's electricity undertaking was property held, or rights acquired, by the corporation wholly or mainly in their capacity as authorised undertakers. The corporation also applied for an order of mandamus to direct the Minister to determine the question in the event of the court granting the order of certiorari. The respondents to the application were the Minister of Housing and Local Government (who had taken the place of the Minister of Local Government and Planning) and the British Electricity Authority.

Capewell, Q.C., and Squibb for the corporation.

J. P. Ashworth for the Minister of Housing and Local Government.

Willis, Q.C., and H. P. Stirling for the British Electricity Authority.

SINGLETON, L.J.: This is an application by the mayor, aldermen and burgesses of the borough of Hove for an order of certiorari to remove into this court to be quashed a decision on Oct. 18, 1951, of the Minister of Local Government and Planning. The appropriate Minister is now the Minister of Housing and Local Government.

The electricity undertaking at Hove was acquired by the corporation under the Hove Corporation Act, 1913, and under s. 3 (2) of that Act the provisions contained in the schedule to the Electric Lighting (Clauses) Act, 1899, so far as material to this case, were incorporated and formed part of the Act. The corporation continued as authorised undertakers until the coming into force of the Electricity Act, 1947, which set up the British Electricity Authority

and area electricity boards, and provided, by s. 14, that all property, rights and liabilities which immediately before the vesting date were the property of a body to whom Part II of the Act applied should vest in such electricity board or boards as might be specified or determined. There were special provisions in the case of authorised undertakers who were local authorities. The position in such a case is provided for by s. 15, sub-s. 1 of which is in these terms:

"In the case of any authorised undertakers being a local authority the provisions of the last foregoing section shall only apply to property held or used by the local authority wholly or mainly in their capacity as authorised undertakers, and rights, liabilities and obligations acquired or incurred by the local authority in the said capacity . . ."

Section 15 (3) provides:

"Any question arising under this section as to whether any property is or was held or used by any such local authority wholly or mainly in their capacity as authorised undertakers, or whether any property is or was (for the purposes of the last foregoing sub-section) held or used partly in the said capacity and partly in other capacities, or whether any rights, liabilities or obligations were acquired or incurred by any such local authority in the said capacity or whether any agreements or documents relate or related to any such local authority in their capacity as authorised undertakers, shall, in default of agreement, be determined by the Minister of Health, and he shall have regard to whether or not entries relating to any property, rights or liabilities were or ought to have been included in accounts furnished by the local authority to the Electricity Commissioners under s. 9 of the Electric Lighting Act, 1882."

Vesting day was Apr. 1, 1948, and thereafter a question which arose as to the right to a sum of money which sprang from the electricity undertaking of the corporation was, by virtue of s. 15 (3), referred to the Minister. His decision was given by a letter of Oct. 18, 1951, in which he states the submissions made to him and adds:

"For the above reasons, the Minister hereby determines that the balance of £17,520 9s. 3d. being the subject of the submission now under consideration, constituted, immediately before Apr. 1, 1948, property held, or rights acquired, by the corporation wholly or mainly in their capacity as authorised (electricity) undertakers."

The contention put forward on behalf of the corporation is that that decision is wrong and ought to be quashed. It is not suggested by the other side that the minister's decision cannot be attacked if error of law on the face of it is shown. It appears to me that the only question for consideration of this court is one of construction—whether the balance of £17,520 9s. 3d. constitutes property held, or rights acquired, by the corporation wholly or mainly in their capacity as authorised undertakers.

The balance sheet of the electricity undertaking of the corporation as at Mar. 31, 1948, the end of its financial year, contains these figures taken from the revenue account and the capital account. On the assets side are investments in government securities (including £4,881 4s. 3d. in respect of reserve fund), £52,259 7s. 11d., and borough treasurer, cash at bank, £56,934 15s. 3d., while on the liabilities side (inter alia) are: capital account, sinking fund, £50; borough treasurer, cash overdrawn, £13,399 15s. 8d.; and on revenue account, reserve fund, £44,295 10s. 3d. I must read paras. 5, 6 and 7 of the agreed statement of facts to make the case clear:

"(5) The corporation have agreed that the authority are entitled to the whole of the investments shown in the said balance sheet and they have transferred them to the authority. The corporation have also agreed that the authority are entitled to such part of the cash at bank, so shown, as immediately before the vesting date was held as the uninvested part of the reserve fund, namely, the sum of £39,414 6s., being the total amount of the reserve fund—£44,295 10s. 3d. less the amount of £4,881 4s. 3d., which consisted of investments, and which was included in the investments transferred to the authority. The corporation have accounted to the authority for the said sum of £39,414 6s., after taking into account the sum of £13,399 15s. 8d. cash overdrawn, and the sum of £50 sinking fund, shown on the liabilities side of the said balance sheet, the amount actually paid by the corporation being £25,964 10s. 4d. (6) In regard to the balance of the said sum of cash at bank, namely, £17,520 9s. 3d., being the difference between £56,934 15s. 3d. and the said sum of £39,414 6s., it is agreed that it was received by the corporation from transactions of the corporation in their capacity as electricity undertakers. It is also agreed that, pursuant to s. 185 (1) of the Local Government Act, 1933, the receipts from the said transactions had been carried to the general rate fund of the borough and were included in the said fund immediately before the vesting date. (7) The authority claim that the corporation are liable to account to them for the said sum of £17,520 9s. 3d. as being property in the form of cash held by the corporation immediately before the vesting date in their capacity as electricity undertakers, or, alternatively, that the right to be paid the said sum by the bank was a right acquired by the corporation in the said capacity and is therefore vested in the authority."

Thus, it is clear that the £17,520 9s. 3d. is part of the £56,934 15s. 3d. item, cash at bank immediately before the vesting date, and an examination of the accounts of the electricity undertaking makes it abundantly clear that this asset was surplus net revenue and did not come from any other source.

Council for the corporation raised two points: (i) that the amount had been paid into the general rate fund, and was thereafter an asset of the corporation for general purposes; and (ii) that, on the facts as stated and agreed, the amount was not property held or used by the local authority wholly or mainly in their capacity as authorised undertakers. His first point is founded on s. 185 of the Local Government Act, 1933. That section must be read with s. 194 of the same Act in mind. Section 185 (1) provides :

"All receipts of the council of a borough, including the rents and profits of all corporate land, shall be carried to the general rate fund of the borough, and all liabilities falling to be discharged by the council shall be discharged out of that fund."

Then a. 194 is in these terms:

" Nothing in this Part of this Act shall—(a) be deemed to require or authorise a local authority to apply or dispose of the surplus revenue arising from any undertaking carried on by them otherwise than in accordance with the provisions of any enactment or statutory order relating to the undertaking . . . "

In *Allechin v. Coulthard* (1) LORD GREENE, M.R., said in relation to those two sections of the Local Government Act, 1933 ([1942] 2 All E.R. 42):

(1) 107 J.P. 191; [1943] 2 All E.R. 352; [1943] A.C. 607.

"The effect of this was that, notwithstanding that all receipts and expenditure were to be paid into and out of the general rate fund, a borough council could not apply the surplus revenue of any of its undertakings for any purpose not authorised by the statute or order governing the undertaking. If, for example, a council had surplus revenue from an electricity undertaking which was only applicable for the purposes of the undertaking, it could not apply it in payment of interest on money borrowed for its general purposes."

Before the vesting date this undertaking was subject to the operation of s. 7 of the schedule to the Electric Lighting (Clauses) Act, 1899, which provided for the application of money received by local authorities as undertakers. The provisions of that section were amended by s. 43 of the Electricity Supply Act, 1926, and sched. V to that Act, which provided how the net surplus in any year should be applied. Section 7 had provided that the moneys received were to be used in the payment of the working and establishment expenses, interest or dividend on mortgages, stock, etc., in creating a reserve fund, and the like. The amendment in the Act of 1926 made a change in the powers of undertakers in regard to any net surplus remaining, and the position now is this [see sched. V]:

"The undertakers shall apply the net surplus remaining in any year and the annual proceeds of the reserve fund when amounting to the prescribed limit—(a) in reduction of the charges for the supply of energy; or (b) in reduction of the capital moneys borrowed for electricity purposes; or (c) with the consent of the Electricity Commissioners in payment of expenses chargeable to capital; or (d) in aid of the local rate: Provided that—(i) the amount which may be applied in aid of the local rate in any year shall not exceed one and a half per cent. of the outstanding debt of the undertaking; and (ii) after Mar. 31, 1930, no sum shall be paid in aid of the local rate unless the reserve fund amounts to more than one-twentieth of the aggregate capital expenditure on the undertaking."

It is clear beyond measure that local authorities who were undertakers could not do what they liked with the net surplus, of which in this case the £17,520 9s. 3d. was a part. They could not use it for general purposes or for purposes of rate reduction except as provided. The corporation had done that so far as they could. They held the balance subject to the provisions to which I have referred, and they held it in their capacity as undertakers. To return to the wording of s. 15 of the Electricity Act, 1947, sub-s. (2) provides:

"In the case of any authorised undertakers being a local authority the provisions of the last foregoing section shall only apply to property held or used by the local authority wholly or mainly in their capacity as authorised undertakers . . ."

This £17,520 9s. 3d. had come to the local authority from the sale of power or energy; it was part of the net surplus remaining in their hands; and they were not entitled to use it except in accordance with the provisions of s. 7 of the schedule to the Electric Lighting (Clauses) Act, 1899, as amended.

That disposes of the first point raised by counsel for the corporation, and I think that the conclusion that the £17,520 9s. 3d. was surplus net revenue, equally disposes of his second point. I do not think that any good purpose would be served by reference to the decision of WYNN-PARRY, J., in *North-Eastern Gas Board v. Leeds Corpn.* (1), in which the learned judge applied the decision of this court in *Allchin v. Coulthard* (2). The decision in each of those cases

(1) ante p. 483.

(2) 107 J.P. 191; [1943] 2 All E.R. 352; [1943] A.C. 607.

went on entirely different statutory provisions. In my opinion, this application should be dismissed.

DENNING, L.J.: I do not add any words of mine to those of SINGLETON, L.J., because I entirely agree with all the reasons he has given and that the application should be dismissed.

ROMER, L.J.: I wholly agree with the judgment which my lord has delivered.

Application dismissed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *John E. Stevens*, town clerk, Hove (for the corporation); *Solicitor, Ministry of Housing and Local Government* (for the Minister); *R. A. Finn*, Solicitor, British Electricity Authority (for the Authority).

C.N.B.

JUDICIAL COMMITTEE OF PRIVY COUNCIL

(LORD NORMAND, LORD OAKSEY AND LORD TUCKER)

May 26, 27, 28, July 1, 1952

TEPER v. REGINAM

Criminal Law—Evidence—Admissibility—Hearsay—Evidence of identification—Part of res gestae.

On a charge of maliciously and with intent to defraud setting fire to a shop, evidence for the prosecution was given by a police-constable, who stated that, after hearing a shout of "Fire", he heard a woman's voice shouting: "Your place burning and you going away from the fire", and immediately afterwards he saw a car being driven away by a man resembling the appellant. The place where the police-constable was standing was more than a furlong from the site of the fire and the incident took place about twenty-six minutes after the fire had started.

HELD: to form part of the *res gestae* it was essential that words sought to be proved by hearsay evidence should be, if not absolutely contemporaneous with the action or event, at least so closely associated with it in time, place, and circumstances, that they were part of the thing being done and so an item or part of the real evidence and not merely a reported statement; where, as here, the words were sought to be proved for identification purposes, the event with which the words should be associated was the commission of the crime itself; and in the circumstances of the present case the evidence of the police-constable was inadmissible.

APPEAL by special leave from a verdict and sentence of the Supreme Court of British Guiana, dated Feb. 7, 1951, whereby the appellant was convicted of arson of a shop with intent to defraud.

The grounds of appeal were that hearsay evidence was admitted to identify the appellant as the person who set fire to the premises, that this evidence was highly prejudicial, and that apart from it there was no evidence on which the jury could properly have convicted the appellant. The Crown contended that the evidence was properly admitted as part of the *res gestae*; that, even if it was inadmissible, the appellant suffered no prejudice; and that there was other evidence sufficient to entitle the jury to convict.

G. D. Roberts, Q.C., Foot, C. Lloyd Luckhoo and M. P. Solomon for the appellant. *Gahan, Q.C., and J. G. Le Quesne* for the Crown.

July 1. LORD NORMAND: This is an appeal by special leave against the conviction of the appellant in the Supreme Court of British Guiana on the

charge that he maliciously and with intent to defraud set fire on Oct. 9, 1950, to a shop belonging to his wife in Regent Street, Georgetown, in which he carried on the business of dry goods store. It was clearly proved that the shop had been maliciously set on fire. On the intent to defraud the Crown's case was that the appellant, having insured the building and stock for sums considerably above their real value, set fire to them with the intention of claiming against the insurance companies. The grounds of the appeal are that hearsay and incompetent evidence was admitted for the purpose of identifying the appellant as the man who set the premises on fire, that this evidence was in a high degree prejudicial to the appellant, and that the other evidence against him was such that no reasonable jury, properly directed, could have convicted him on it alone, or, at least, that it was so flimsy and inconclusive that it must have been outweighed by the hearsay evidence in the jury's consideration of the evidence as a whole. The contentions for the Crown were that the impugned evidence was properly admitted as part of the *res gestae*; that, even if it was inadmissible, the appellant suffered no real prejudice; and that the other evidence was amply sufficient to entitle a reasonable jury to convict. An important question of principle is involved in the issue on the admission of the evidence, and their Lordships propose to deal with it at once. That approach to the appeal carries with it no inconvenience for this evidence is concerned with an incident which stands apart from the matters dealt with in the rest of the evidence.

The witness is Police-constable Cato. He came on duty about 2 a.m. on Oct. 9 and then went along a street named Camp Street towards Regent Street. He heard a shout of "Fire", and then one fire engine passed and after it a second fire engine, both going along Regent Street. He stopped at the corner of Regent and Camp Streets. His evidence continues,

"There were crowds going east and west along Regent Street to and from the fire. I heard a woman's voice shouting: 'Your place burning and you going away from the fire'. Immediately then a black car which was proceeding west along Regent Street turned north into Camp Street. In the car was a fair man resembling accused. I did not observe the number of the car. I could not see the fire from where I was standing."

In cross-examination he said he did not know who or where the woman was. She was not a witness at the trial. It is common ground that the incident took place at a distance of more than a furlong from the site of the fire and that it happened not less than twenty-six minutes after the fire was started.

In British Guiana provision has now been made for a Court of Criminal Appeal, but at the date of this conviction the only means of bringing it under judicial review was by a Case stated by the judge of the court before whom the cause had been tried for the opinion of the Court of Appeal (Criminal Law (Procedure) Ordinance, s. 174 (Laws of British Guiana, 1930, c. 18)). The appellant applied to the judge to state a Case on the admissibility of Cato's evidence, but the application was refused. It is not necessary to consider the reasons for the refusal, and the decision of the learned judge is not under appeal.

The rule against the admission of hearsay evidence is fundamental. It is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross examination, and the light which his demeanour would throw on his testimony is lost. Nevertheless, the rule admits of certain carefully safeguarded and limited exceptions, one of which is that words may be proved when they form part of the *res gestae*. The rules controlling this exception are common to the jurisprudence of British Guiana, England and Scotland. It appears to rest

ultimately on two propositions—that human utterance is both a fact and a means of communication, and that human action may be so interwoven with words that the significance of the action cannot be understood without the correlative words and the dissociation of the words from the action would impede the discovery of truth. But the judicial applications of these two propositions, which do not always combine harmoniously, have never been precisely formulated in a general principle. Their Lordships will not attempt to arrive at a general formula, nor is it necessary to review all of the considerable number of cases cited in the argument. This, at least, may be said, that it is essential that the words sought to be proved by hearsay should be, if not absolutely contemporaneous with the action or event, at least so clearly associated with it, in time, place, and circumstances, that they are part of the thing being done, and so an item or part of real evidence and not merely a reported statement: *Reg. v. Bedingfield* (1); *O'Hara v. Central S.M.T. Co., Ltd.* (2). How slight a separation of time and place may suffice to make hearsay evidence of the words spoken incompetent is well illustrated by the two cases cited. In *Bedingfield's* case (1) a woman rushed with her throat cut out of a room in which the injury had been inflicted into another room where she said something to persons who saw her enter. Their evidence about what she said was ruled inadmissible by COCKBURN, C.J. In *O'Hara's* case (2), a civil action, the event was an injury to a passenger brought about by the sudden swerve of the omnibus in which she was travelling. The driver of the omnibus said in his evidence that he was forced to swerve by a pedestrian who hurried across his path. Hearsay evidence of what was said by a man on the pavement at the scene of the accident as soon as the injured party had been attended to was held to be admissible in corroboration of the driver's evidence. But what was said twelve minutes later and away from the scene by the same man was held not part of the *res gestae*. In *Public Prosecutions Director v. Christie* (3) the principle of the decision in *Bedingfield's* case (1) was approved by LORD READING with whom LORD DUNEDIN concurred, and no criticism of it is to be found in the speeches of the other noble and learned Lords who sat with them. In *Reg. v. Gibson* (4) the prosecutor gave evidence in a criminal trial that, immediately after he was struck by a stone, a woman going past, pointing to the prisoner's door, said: "The person who threw the stone went in there." This evidence was not objected to at the trial, but it was admitted by counsel for the prosecution in a Case Reserved that the evidence was incompetent. The conviction was quashed, and from their judgments it is clear that the learned judges who took part in the decision were far from questioning the correctness of counsel's admission. In *Gibson's* case (4) the words were closely associated in time and place with the event, the assault. But they were not directly connected with that event itself. They were not words spontaneously forced from the woman by the sight of the assault, but were prompted by the sight of a man quitting the scene of the assault and they were spoken for the purpose of helping to bring him to justice.

The special danger of allowing hearsay evidence for the purpose of identification requires that it shall only be allowed if it satisfies the strictest test of close association with the event in time, place, and circumstances. In *Christie's* case (3) LORD MOULTON said:

"Identification is an act of the mind, and the primary evidence of what was passing in the mind of a man is his own testimony, where it can be

(1) (1879), 14 Cox C.C. 341.

(2) 1941 S.C. 363.

(3) 78 J.P. 321; [1914] A.C. 545.

(4) (1887), 51 J.P. 742; 18 Q.B.D. 537.

obtained. It would be very dangerous to allow evidence to be given of a man's words and actions, in order to show by this extrinsic evidence that he identified the prisoner, if he was capable of being called as a witness and was not called to prove by direct evidence that he had thus identified him."

There is yet another proposition which can be affirmed, viz., that for identification purposes in a criminal trial the event with which the words sought to be proved must be so connected as to form part of the *res gestae* is the commission of the crime itself—the throwing of the stone, the striking of the blow, the setting fire to the building, or whatever the criminal act may be. Counsel for the Crown submitted that any relevant event or action may be accompanied by words which may have to be proved in order to bring out its true significance. There is a limited sense in which this is true, but it is not always true, and much depends on the use to be made of the evidence. In *Christie's case* (1) hearsay evidence of certain words uttered by a child, the victim of an indecent assault, in the presence and hearing of the accused were held to be admissible in explanation of the demeanour of the accused in response to them. But the evidence was held inadmissible for the purpose of showing that the child identified the accused as his assailant. In the present case identification is the purpose for which the hearsay was introduced, and its admission goes far beyond anything that has been authorised by any reported case.

Before assessing the prejudice caused by the wrongful admission of the hearsay evidence and deciding whether it affected the substantial justice of the trial, the nature and effect of the other evidence must be looked at. [His LORDSHIP reviewed the evidence and continued:] The circumstantial evidence falls short of conclusiveness and a properly instructed jury, having it alone before it, would have had a more than usually difficult decision to make. There were several circumstances pointing to the appellant's guilt, and though not one of them alone was of great moment, yet *juncta jvant*, and it could not have been said that there was no legal evidence to support a verdict of Guilty. That, however, does not decide the issue of the appeal. It is now necessary to consider whether the admission of Cato's hearsay evidence was, having regard to the weakness of the other evidence, "something which deprived the accused of the substance of fair trial and the protection of the law": *Ibrahim v. Reg.* (2); *Renouf v. A.-G. for Jersey* (3); *Dharmasena v. Reg.* (4). It is a principle of the proceedings of the board that it is for the appellant in a criminal appeal to satisfy the board that a real miscarriage of justice has occurred. In *Dal Singh v. King-Emperor* (5) it was observed, in a case where this board had no ground for doubting that the appellant had been properly convicted, that the mere admission of incompetent evidence, not essential to the result, is not a ground for allowing an appeal against conviction. In the same case it was stated that: "The dominant question is the broad one whether substantial justice has been done" and that in the particular case the question was "whether, looking at the proceedings as a whole, and taking into account what has properly been proved, the conclusion come to has been a just one."

Their Lordships have, therefore, in the end to decide whether the appellant has shown that the improper admission of the hearsay evidence of identification was so prejudicial to the appellant, in a case where the rest of the evidence was weak, that the proceedings as a whole have not resulted in a fair trial. The test

(1) 78 J.P. 321; [1914] A.C. 545.

(2) [1914] A.C. 599.

(3) [1936] 1 All E.R. 936; [1936] A.C. 445.

(4) [1951] A.C. 1.

(5) (1917), L.R. 44 Ind. App. 137.

is whether on a fair consideration of the whole proceedings the board must hold that there is a probability that the improper admission of hearsay evidence turned the scale against the appellant. Their Lordships are satisfied that the hearsay evidence was in a high degree prejudicial. Its effect may be gauged by considering what Cato's evidence would have amounted to if it had been excluded. He could then only have said that in consequence of something heard by him his attention was directed to a man driving a black car who resembled the appellant. This evidence would have been worthless for the purpose of identifying the appellant with the man who set fire to a building a furlong away and twenty-six minutes earlier. It is the hearsay and the hearsay alone which gives dramatic force to Cato's otherwise valueless evidence of identification, and confers on it a specious importance. It is impossible to avoid the conclusion that the jury might well, and probably did, regard Cato's hearsay evidence as sufficient to turn the scale. Counsel for the Crown sought to belittle the prejudice. It was said that the fact that no objection was taken to it at the trial should be allowed "to have some bearing on the question whether the accused was really prejudiced": *Stirland v. Public Prosecutions Director* (1). That is a consideration which weighs in a case where the evidence improperly admitted would not by its nature cause serious prejudice or where the other evidence left little or no reasonable doubt of the appellant's guilt. But it is of no real moment in the present case. It was also submitted that the direction of the learned judge in his charge sufficiently safeguarded the appellant. The jury were directed that the evidence was not conclusive, but that it could be taken along with other evidence, and that if from other facts the jury found that the accused was there, this evidence "tied up with it." Cato's whole evidence was accordingly left to the jury's consideration to make of it what they could along with the other evidence. It is not necessary to decide what would have been the result if there had been a clear direction to disregard entirely the hearsay evidence. But no direction short of that could avail to save the verdict, and the appeal must succeed.

The result was intimated to the parties at the conclusion of the argument. Thereupon, the appellant's counsel asked for the costs of the appeal and of the proceedings in the Supreme Court. The practice of the board is against giving expenses to the successful appellant in a criminal appeal save in very special circumstances: *Johnson v. Reg.* (2) ([1904] A.C. 825), and special circumstances were found in *Waugh v. Reg.* (3). In the present case there are no circumstances which would justify a departure from the ordinary rule of practice. Their Lordships have, therefore, humbly advised Her Majesty that the appeal should be allowed. There will be no order as to costs.

Appeal allowed.

Solicitors: *Hy. S. L. Polak & Co.* (for the appellant); *Burchells* (for the Crown).

J.D.P.

(1) 109 J.P. 1; [1944] 2 All E.R. 13.

(2) [1904] A.C. 817.

(3) [1950] A.C. 203.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J.)

July 16, 1952

PHARMACEUTICAL SOCIETY OF GREAT BRITAIN v. BOOTS CASH CHEMISTS (SOUTHERN), LTD.

Poison—Sale by retail—Sale by or under supervision of registered pharmacist—Chemist's "self-service" shop—Pharmacist supervising transaction at time of payment—Pharmacy and Poisons Act, 1933 (23 and 24 Geo. 5, c. 25), s. 18 (1) (a) (iii).

Shelves round the walls and on an "island" fixture in a chemist's "self-service" shop were stocked with drugs and proprietary medicines which were specified in Part I of the Poisons List compiled under s. 17 (1) of the Pharmacy and Poisons Act, 1933. The drugs in question were in packages and other containers with the prices marked on them. A customer chose the article he required from a shelf, put it into a basket which he had picked up on entering the shop, and took it to the cashier at one of the two exits. The cashier scrutinised the articles, told the customer the price, and received payment. A registered pharmacist employed by the chemist and in control of the section where the drugs and proprietary medicines were sold supervised the transaction at this stage, and was authorised, if he thought fit, to prevent any customer from taking away any article.

Held: the sale of the articles was effected "under the supervision of a registered pharmacist" as required by s. 18 (1) (a) (iii) of the Pharmacy and Poisons Act, 1933, since it was completed on the acceptance of the price, the taking of the article from the shelf by the customer constituting an offer by him to buy and not his acceptance of an offer by the chemist to sell.

SPECIAL CASE stated by the parties under R.S.C., Ord. 34, r. 1, in an action by the plaintiffs for a declaration that sales of poisons made by the defendants at their premises at 73, Burnt Oak Broadway, Edgware, in the county of Middlesex, on Apr. 13, 1951, were effected otherwise than by or under the supervision of a registered pharmacist as required by s. 18 (1) (a) (iii) of the Pharmacy and Poisons Act, 1933.

The defendants were retail sellers of drugs carrying on business at their shop premises at 73, Burnt Oak Broadway, Edgware, Middlesex, which were entered in the register of premises kept under s. 12 (1) of the Act of 1933. The premises consisted of a single room adapted to enable customers to serve themselves, and accommodating some sixty customers at one time. At the entrance a printed notice described the business as "Boots Self Service." The principal part of the room comprised a part described on a printed notice as "Toilets dept." and another part described as "Chemist's dept.", and it contained shelves round the walls and on an "island" fixture in the centre. In the chemist's department a wide range of drugs, including proprietary medicines, were displayed on the shelves in packages or other containers, with a conspicuous indication of the retail price of each. Drugs, including proprietary medicines, included in, or containing substances included in, Part I of the Poisons List referred to in s. 17 (1) of the Act of 1933 were displayed only in a section of the chemist's department devoted exclusively thereto, and that section was fitted with a shutter so that all the articles in it could at any time be securely enclosed and excluded from display. None of the drugs came within sched. I to the Poisons Rules, 1949 (S.I. 1949, No. 539).

The defendants employed at the premises a manager, a registered pharmacist in personal control of the chemist's department subject to the directions of a superintendent in accordance with s. 9 (1) (b) of the Act, three assistants, and two cashiers. The manager, the pharmacist, and one or more assistants were

present in the room when the premises were open for the sale of goods. A customer entering the premises would pass a barrier at which he would pick up an empty wire basket. He would then choose the packages or other containers of drugs he required from the shelves, put them in the basket, and take them to one of the two exits. At each exit a cashier, working under the supervision of the pharmacist, scrutinised the articles, told the customer the total price, and received payment. This part of every transaction involving the sale of a drug and taking place at the cash desk was supervised by the pharmacist, who had the defendants' authority, if he thought fit, at this stage to prevent any customer from removing any drugs from the premises. Customers were not told of this authorisation. On Apr. 13, 1951, two customers followed this procedure when purchasing respectively a bottle of medicine known as compound syrup of hypophosphites, containing 0.01 per cent. W/V strychnine, and a bottle of Famel syrup, containing 0.023 per cent. W/V codeine, both being poisons included in Part I of the Poisons List, but, owing to the small percentages of strychnine and codeine, not coming within the Poisons Rules, 1949, sched. I.

The question for the opinion of the court was whether each sale was effected by or under the supervision of a registered pharmacist in accordance with s. 18 (1) (a) (iii) of the Pharmacy and Poisons Act, 1933.

Lloyd-Jones, Q.C., and T. Dewar for the plaintiffs.

Glyn-Jones, Q.C., and Everington for the defendants.

LORD GODDARD, C.J.: This is a Special Case stated under R.S.C., Ord. 34, r. 1, and agreed between the parties and it turns on s. 18 (1) of the Pharmacy and Poisons Act, 1933, which provides:

"Subject to the provisions of this Part of this Act, it shall not be lawful—

(a) for a person to sell any poison included in Part I of the Poisons List, unless—(i) he is an authorised seller of poisons; and (ii) the sale is effected on premises duly registered under Part I of this Act; and (iii) the sale is effected by, or under the supervision of, a registered pharmacist."

The defendants have adopted what is called a "self-service" system in some of their shops—in particular, in a shop at 73, Burnt Oak Broadway, Edgware. The system of self-service consists in allowing persons who resort to the shop to go to shelves where goods are exposed for sale and marked with the price. They take the article required and go to the cash desk, where the cashier or assistant sees the article, states the price, and takes the money. In the part of the defendants' shop which is labelled "Chemist's dept." there are on certain shelves ointments and drugs, some of which contain poisonous substances but in such minute quantities that there is no acute danger. These substances come within Part I of the Poisons List, but the medicines in the ordinary way may be sold without a doctor's prescription and can be taken with safety by the purchaser. There is no suggestion that the defendants expose dangerous drugs for sale. Before any person can leave with what he has bought he has to pass the scrutiny and supervision of a qualified pharmacist.

The question for decision is whether the sale is completed before or after the intending purchaser has paid his money, passed the scrutiny of the pharmacist, and left the shop, or, in other words, whether the offer out of which the contract arises is an offer of the purchaser or an offer of the seller.

In *Carlill v. Carbolic Smoke Ball Co.* (1) a company offered compensation to anybody who, having used the carbolic smoke ball for a certain length of time in a prescribed manner, contracted influenza. One of the inducements held out to

(1) 57 J.P. 325; [1893] 1 Q.B. 256.

people to buy the carbolic smoke ball was a representation that it was a specific against influenza. The plaintiff used it according to the prescription, but, nevertheless, contracted influenza. She sued the Carbolic Smoke Ball Co. for the compensation and was successful. In the Court of Appeal *BOWEN, L.J.*, said (57 J.P. 326):

"... there can be no doubt that where a person, in an offer made by him to another person, expressly or impliedly intimates a particular mode of acceptance as sufficient to make the bargain binding, it is only necessary for the other person to whom such offer is made to follow the indicated method of acceptance; and if the person making the offer, expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, performance of the condition is a sufficient acceptance without notification."

Counsel for the plaintiffs says that what the defendants did was to invite the public to come into their shop and to say to them: "Help yourself to any of these articles, all of which are priced", and that that was an offer by the defendants to sell to any person who came into the shop any of the articles so priced. Counsel for the defendants, on the other hand, contends that there is nothing revolutionary in this kind of trading, which, he says, is in no way different from the exposure of goods which a shop-keeper sometimes makes outside or inside his premises, at the same time leaving some goods behind the counter. It is a well-established principle that the mere fact that a shop-keeper exposes goods which indicate to the public that he is willing to treat does not amount to an offer to sell. I do not think I ought to hold that there has been here a complete reversal of that principle merely because a self-service scheme is in operation. In my opinion, what was done here came to no more than that the customer was informed that he could pick up an article and bring it to the shop-keeper, the contract for sale being completed if the shop-keeper accepted the customer's offer to buy. The offer is an offer to buy, not an offer to sell. The fact that the supervising pharmacist is at the place where the money has to be paid is an indication that the purchaser may or may not be informed that the shop-keeper is willing to complete the contract. One has to apply common sense and the ordinary principles of commerce in this matter. If one were to hold that in the case of self-service shops the contract was complete directly the purchaser picked up the article, serious consequences might result. The property would pass to him at once and he would be able to insist on the shop-keeper allowing him to take it away, even where the shop-keeper might think it very undesirable. On the other hand, once a person had picked up an article, he would never be able to put it back and say that he had changed his mind. The shop-keeper could say that the property had passed and he must buy.

It seems to me, therefore, that it makes no difference that a shop is a self-service shop and that the transaction is not different from the normal transaction in a shop. The shop-keeper is not making an offer to sell every article in the shop to any person who may come in, and such person cannot insist on buying by saying: "I accept your offer". Books are displayed in a bookshop and customers are invited to pick them up and look at them even if they do not actually buy them. There is no offer of the shop-keeper to sell before the customer has taken the book to the shop-keeper or his assistant and said that he wants to buy it and the shop-keeper has said: "Yes." That would not prevent the shop-keeper, seeing the book picked up, from saying: "I am sorry I cannot let you have that book. It is the only copy I have got, and I have already promised it to another customer". Therefore, in my opinion, the mere fact that a customer

picks up a bottle of medicine from a shelf does not amount to an acceptance of an offer to sell, but is an offer by the customer to buy. I feel bound also to say that the sale here was made under the supervision of a pharmacist. There was no sale until the buyer's offer to buy was accepted by the acceptance of the purchase price, and that took place under the supervision of a pharmacist. Therefore, judgment is for the defendants.

Judgment for the defendants.

Solicitors: *A. C. Castle* (for the plaintiffs); *Masons* (for the defendants).

F.A.A.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., HILBERY AND SLADE, JJ.)

July 21, 1952

CRAWLEY v. PARSONS

Merchant Shipping—Refusal to proceed to sea—Substitute trawler hand—Agreement to act as substitute—Articles not signed—Liability to conviction—Merchant Shipping Act, 1894 (57 and 58 Vict., c. 60), s. 376 (1) (b), (d), s. 401 (3).

At a court of summary jurisdiction informations were preferred by the appellant, charging the respondent that he, being lawfully engaged to serve as a cook in the steam trawler, *Yashima*, did on Oct. 3, 1951, (i) unlawfully and wilfully disobey a lawful command, namely, a command that he should proceed to sea with the trawler, contrary to s. 376 (1) (d) of the Merchant Shipping Act, 1894, and (ii) without reasonable cause refuse to proceed to sea with the trawler, contrary to s. 376 (1) (b) of the Act. Two further informations charged the respondent with similar offences on the following day.

The facts relating to the offences were the same, and the justices found that on Oct. 1, 1951, at the office of the appellant, who was employed by N. & W., Ltd., the respondent applied to the appellant for employment as a cook in trawlers belonging to N. & W., Ltd. At that time there were no vacancies for cooks and the respondent was engaged by the appellant for shore work. Later that day a vacancy for a cook occurred in the steam trawler *Yashima*. The appellant told the respondent that he required a substitute and offered to appoint him as the substitute, which offer was accepted by the respondent. He was then informed that the trawler would be sailing on Oct. 3 on the morning tide from the West Dock Basin, Cardiff, and was ordered to proceed on board and to sail with the trawler, but he was not informed of the terms and conditions on which he would have to sail in the capacity of cook. At that time the ship's copy of the fishing boats' running agreement was in the skipper's cabin. On the morning of Oct. 3 the crew assembled with the exception of the respondent. A car was sent for him and he came down with his bag, but he said that owing to drink he was in no condition to go to sea. The respondent would neither sail with the trawler nor sign the running agreement, i.e., the articles, but he informed the appellant that he was prepared to sail that night, so the trawler missed that tide and arrangements were made for the crew to join her so that she could sail the following morning, and the respondent was given an order to join the trawler. On Oct. 3 he had drawn £1 in advance of wages, but when the trawler was ready he refused to sail, saying that he had been unable to obtain a further advance of wages, but that he would sail on Oct. 5. On that day he again failed to appear, and he never did join the ship.

The justices found that (i) the effect of s. 401 (3) of the Merchant Shipping Act, 1894, was not to render a seaman who had not signed the fishing boats' agreement liable to be convicted of the offences charged in the informations, but to exempt the skipper of a fishing boat from a penalty for carrying to sea in an emergency a substitute who had not actually signed the agreement before the boat sailed; that (ii) following the dictum of DARLING, J., in *Haves v. Brown* (1917) (81 J.P. 300), the respondent could not be convicted of refusing to proceed to sea unless he had signed articles, although he could be convicted of refusing to join his ship after being lawfully engaged; and (iii) that it was not open to them in law to convict

the respondent of the offences set out in the informations. They, accordingly, dismissed the informations, and the prosecutor appealed.

HELD: that, though there was no express finding of the fact, the case should be decided on the assumption that the respondent was engaged as a substitute for a seaman who had signed the fishing boats' agreement, and that on this assumption the justices, on the construction of the relevant sections of the Act, had come to a right conclusion for the right reasons.

CASE STATED by Cardiff justices.

The appellant was employed by Neale and West, Ltd., as a ship's husband, and on Oct. 1, 1951, the respondent applied to him, at his office in Cardiff, for employment as a cook in trawlers belonging to the company. There being, at the time, no vacancy for a cook, the respondent was engaged by the appellant for shore work. Later that day a vacancy for a cook occurred in the Yashima, a steam trawler owned by the company, the appellant informed the respondent that he required a substitute and offered to appoint him as the substitute, and the offer was accepted. The appellant then informed the respondent that the trawler would be sailing on the morning of Oct. 3 from the West Dock Basin, Cardiff, and ordered him to proceed on board and to sail with her. The Yashima was a fishing boat to which Part IV of the Merchant Shipping Act, 1894, applied. As the fishing boat's running agreement was not available at the time, it was not read to or signed by the respondent, and he was not informed of the terms and conditions on which he was to sail in the capacity of cook. On Oct. 2, when the appellant had access to the agreement, the respondent could not be found. On the morning of Oct. 3 the crew, with the exception of the respondent, assembled on board the trawler. A car was sent to fetch the respondent, who came to the trawler with his bag, but said that owing to drink he was not in a condition to sail. He refused to sign the running agreement, but said that he was prepared to sail that night. Owing to his refusal to sail, the trawler missed the morning's tide and arrangements were made for her to sail on the morning tide of Oct. 4. The respondent was ordered by the appellant to join the trawler and to sail at that time, and he agreed to do so. Later on Oct. 3 he went to the company's head office and was paid £1 by the cashier as an advance of wages. On the following morning he again failed to join the trawler, but promised the appellant, in the evening, that he would sail on Oct. 5. He again failed to appear, but later in the day he promised that he would join the trawler on Oct. 6. He did not do so. On Nov. 19, 1951, at a court of summary jurisdiction sitting at Cardiff, the appellant preferred four informations against the respondent, under the Merchant Shipping Act, 1894, charging him (i) with having wilfully disobeyed a lawful command, viz., to proceed to sea on Oct. 3, 1951, while he was lawfully engaged to serve as cook in the trawler, contrary to s. 376 (1) (d) of the Act; (ii) with having, without reasonable cause, on the same day and in the same circumstances, refused to proceed to sea with the trawler, contrary to s. 376 (1) (b) of the Act; and with similar offences alleged to have been committed on the following day. The appellant contended *inter alia* (a) that the respondent was lawfully engaged to serve in the trawler notwithstanding the fact that he had not signed the fishing boat's running agreement, there being a binding contract which did not offend against the Act of 1894 and on which the respondent could have sued for damages had it been broken by the shipowners, and (b) that, the respondent having been engaged as a substitute, s. 401 (3) of the Act of 1894 applied, and, therefore, it would have been lawful for him to have signed the agreement immediately after the trawler had sailed, and, accordingly, the signing of the agreement was not a condition precedent to carrying the respondent to sea and he could lawfully be ordered to proceed to sea with the trawler. The

respondent, who was not legally represented, contended that he could not be compelled to obey an order to proceed to sea in the trawler as he had not signed the fishing boat's agreement. The justices were of opinion:

"(i) that the effect of s. 401 (3) of the Merchant Shipping Act, 1894, was not to render a seaman who had not signed the fishing boat's agreement liable to be convicted of the offences set out in the informations, but to exempt the skipper of a fishing boat from a penalty for carrying to sea in an emergency a substitute who had not actually signed the fishing boat's agreement before the boat sailed, and (ii) following the clear dictum of *DARLING, J.*, that the respondent in the case of *Haws v. Brown* (1) could not be convicted of refusing to proceed to sea unless he had signed articles, although he could be convicted of refusing to join his ship after being lawfully engaged, that it was not open to us in law to convict the respondent of the offences set out in the said informations as he had not signed the fishing boat's agreement . . ."

They, therefore, dismissed the informations.

Bowen, Q.C., and *H. J. Davies* for the appellant.

The respondent did not appear.

LORD GODDARD, C.J., stated the facts and continued: The Merchant Shipping Act, 1894, s. 376 (1), provides:

"If a seaman lawfully engaged to serve in any fishing boat, or an apprentice in the sea-fishing service, commits any of the following offences, that seaman or apprentice shall be liable to be punished summarily as follows . . ."

Section 376 (1) (b) deals with the offence of

" . . . refusing without reasonable cause to join or to proceed to sea in his fishing boat . . . either at the commencement or during the progress of the engagement . . ."

Section 376 (1) (d) deals with the offence of

" . . . wilful disobedience, that is to say . . . wilfully disobeying any lawful command during the engagement . . ."

Section 399 (1) provides:

"The skipper of every fishing boat being a trawler of twenty-five tons tonnage or upwards shall enter into an agreement (in this Part of this Act called a fishing boat's agreement), in accordance with this Part of this Act, with every seaman whom he carries to sea as one of his crew from any port in England or Ireland, and shall not carry to sea any seaman with whom no such agreement has been entered into."

Section 399 (2) imposes a penalty on a skipper who commits an offence against s. 399 (1). Section 400 (1) provides:

"A fishing boat's agreement shall be in a form approved by the Board of Trade, and be dated at the time of the first signature thereof, and be signed by the skipper before a seaman signs it."

Section 400 (2) sets out the matters which the agreement has to contain, including

"(g) any regulations as to conduct on board, and as to fines, short allowance of provisions, or other lawful punishment for misconduct, which the Board of Trade have approved as proper and the parties agree to adopt."

(1) (1917), 81 J.P. 300.

The functions of the Board of Trade in these matters are now transferred to the Minister of Transport. Section 401 provides:

"(1) A fishing boat's agreement shall be signed by each seaman, and the skipper shall cause the agreement to be read over and explained to each seaman, or otherwise ascertain that each seaman understands the same before he signs it, and shall attest each signature. (2) When the crew is first engaged the agreement shall be signed in duplicate, and one part shall be sent by the skipper to the superintendent at the port of departure and retained by him, and the other part shall be retained by the skipper, and shall contain a special place for the descriptions and signatures of substitutes, or persons engaged subsequently to the first departure of the fishing boat."

Then comes the sub-section on which great reliance has been placed in this case:

"(3) Where a substitute is engaged in the place of a seaman who has signed the agreement, and whose services are lost by death, desertion, failure to join, or other unforeseen cause, the skipper shall, before the fishing boat puts to sea, if practicable, and if not as soon afterwards as possible, cause the agreement to be read over and explained to the substitute, and the substitute shall thereupon sign the same in the presence of the skipper who shall attest the signature."

It was not contended in this court that s. 401 (3) could apply if the cook who was originally engaged had not signed the fishing boat's agreement, but there was no express finding in the Case, and we were not told, whether he had. I think, however, that it is a fair inference that the case was argued below on the ground that the previous cook had signed the agreement and would have joined but for some unforeseen circumstance, and that the respondent was engaged as a substitute within s. 401 (3), and, accordingly, we proceed on that basis.

Counsel for the appellant contended, first, that there was a lawful engagement in this case, and I am entirely of that opinion. Indeed, so far as this court is concerned, *Vickerson v. Croue* (1) is conclusive on that point. That case decided that there could be a lawful engagement of a seaman as a member of a crew although he had not signed any agreement under s. 113 of the Act [the relevant section in that case]. Later cases, however, show that a seaman who has been engaged as a member of the crew cannot be called on to proceed to sea unless he has signed an agreement. As a general rule, a seaman is engaged to proceed to sea, and, therefore, at first sight, it seems odd to find that a seaman has committed a criminal offence merely because he has not joined the ship for which he has been engaged, but that he cannot be prosecuted for not proceeding to sea. On further consideration, however, and, in particular, after reading the judgment of CHITTY, J., in *Re Great Eastern Steamship Co., Williams' Claim* (2), which was cited by ROWLATT, J., and ATKIN, J., in *Vickerson v. Croue* (1) as the authority for the proposition that there can be an engagement before an agreement is signed, one can see the reason for the distinction. There may be occasions when a shipowner engages seamen as members of the crew, and they agree to act as members of the crew, and they are then set to work in the ship while she is still in port. In such a case there is a lawful engagement which the Act does not require to be in writing.

In *Re Great Eastern Steamship Co.* (2) CHITTY, J., called attention to s. 181 of the Merchant Shipping Act, 1854, which was in the same words as s. 155 of the Act of 1894, and said:

(1) 78 J.P. 88; [1914] 1 K.B. 462.

(2) (1885), 53 L.T. 594.

"Section 181 is also material, because it entitles the seaman to wages in a foreign-going ship before the articles are signed."

It follows that a seaman who is engaged to serve on a trawler and agrees to do so commits an offence if, being directed to join the ship, he fails to do so. Conversely, if he tried to join the trawler after he had been engaged to serve on it and the employers then refused to take him and to sign him on as a member of the crew, they would be liable for a breach of contract. But to say that a man commits an offence because he fails to join his ship when he has agreed to do so is different from saying that he commits an offence in refusing to proceed to sea when he has not signed an agreement. This was clearly shown in *Haws v. Brown* (1), to which the justices referred in their opinion. The members of the Divisional Court in that case were DARLING, AVORY and SHEARMAN, J.J. Giving the leading judgment, with which the other learned judges agreed, DARLING, J., said:

"I think . . . that a seaman may commit an offence against the Merchant Shipping Acts . . . by refusing to join the ship on board of which he may be asked to sign the articles under which he will have to sail. He could not be convicted of the offence of refusing to go to sea unless he had signed articles."

There the distinction is clearly drawn between the case of a seaman who is engaged to serve in a ship and fails to join her and that of a seaman who is required to proceed to sea although he has not signed an agreement. A seaman can be convicted of the offence of failing to join his ship although he has not signed the agreement, but he need not obey an order to proceed to sea unless he has signed the agreement. The reason for this distinction is that the provisions in regard to agreements are inserted in the Act as a precaution against what is known as "crimping".

While agreeing that there was this distinction, counsel for the appellant contended that, by reason of s. 401 (3), these considerations did not apply in the case of a substitute, the effect of the sub-section being that, if a seaman had been engaged and had agreed to act as a substitute for a seaman who had already signed the agreement, he was bound to proceed to sea notwithstanding the fact that the agreement had not been read to him and signed by him. In my opinion, the sub-section does not have the effect for which counsel for the appellant contends. If it did, it would deprive a seaman of the provisions against "crimping" which are inserted in the Act for his benefit. The effect of s. 401 (3) is that, where a fishing boat has had to put to sea before a substitute has signed the agreement, the skipper has not committed an offence against s. 399 (1) and made himself liable to a penalty under s. 399 (2) provided that he causes the agreement to be read to and signed by the substitute as soon as possible after putting to sea. For these reasons, I am of opinion that the justices came to a right conclusion and for the right reasons, and, therefore, this appeal fails and is dismissed.

HILBERY, J.: I am of the same opinion for the same reasons.

SLADE, J.: I also agree.

Appeal dismissed.

Solicitors: *Kinch & Richardson*, agents for *Vachell & Co.*, Cardiff (for the appellant); *Treasury Solicitor*.

T.R.F.B.

COURT OF APPEAL

(SOMERVELL, DENNING AND ROMER, L.JJ.)

July 8, 9, 25, 1952

RAWLENCE v. CROYDON CORPORATION

Housing—House unfit for human habitation—Notice to execute works—"Person having control"—Receipt of rack-rent—"Full net annual value" of house—House controlled under Rent Acts—Housing Act, 1936 (c. 51), s. 9 (4).

A dwelling-house to which the Rent Restrictions Acts applied was let at the maximum permitted rent of £45 a year. Flooring of the house being in a state of disrepair, the local authority served on the landlord, as the person having control of the house, a notice under s. 9 (1) of the Housing Act, 1936, requiring him to execute such works as would render the house fit for human habitation.

HELD: the full net annual value of the house within s. 9 (4) was the value of the house to the landlord, and in the case of a house within the Rent Restrictions Acts was the maximum rent permitted by those Acts, i.e., in the present case, £45; as the landlord was receiving this rent, he was receiving a rack-rent; and, therefore, he was the person in control of the house within the meaning of the sub-section, and the notice was properly served on him.

Poplar Metropolitan Borough Assessment Committee v. Roberts (1922) (86 J.P. 137), distinguished.

Semble: if the rent permitted by the Rent Acts were not the rack-rent, the landlord was the person who would receive a rack-rent if the house were let at a rack-rent, because, if the restrictions imposed by the Rent Acts were removed, he was the person who would receive the full rent.

APPEAL by the defendant, the local authority, from an order of His Honour JUDGE SIR GERALD HURST, Q.C., made at Croydon County Court on May 9, 1952, allowing an appeal by the plaintiff, a landlord, from an order made by the local authority under s. 9 (1) of the Housing Act, 1936.

The landlord was the owner of premises at No. 3, Burlington Road, Thornton Heath, which he let on a yearly tenancy at a rent of £45 exclusive of rates, the tenant being liable for internal repairs. The rent charged was the full permitted rent under the Rent Acts. At all material times the house was unfit for human habitation by reason of the condition of the kitchen floor which could have been rendered fit at a reasonable expense. The local authority served on the landlord a notice under s. 9 (1) of the Act of 1936 requiring him to execute works which, in the opinion of the authority, would render the house fit. For the landlord it was contended that, owing to the restrictions on the recoverable rent imposed by the Rent Acts, he was not in receipt of the rack-rent, and so was not the person having control of the house within the meaning of s. 9 (4), and, therefore, the notice should not have been served on him. For the local authority it was contended that, as the landlord was receiving the full permitted rent, he was the person who was receiving the rack-rent, or, alternatively, if he were not receiving the rack-rent, he was the person who would receive it if the house were let at a rack-rent. The county court judge held that the landlord was not in receipt of the rack-rent, and, further, he was not the person who would be in receipt of the rack-rent if the house were so let, and he allowed the landlord's appeal.

Maurice Lyell for the local authority.

M. R. Hoare for the landlord.

Cur. adv. vult.

July 25. The following judgments were read.

SOMERVELL, L.J.: This appeal turns on the construction of s. 9 of the

Housing Act, 1936, as amended by the Housing Act, 1949, s. 1, and sched. I, which is as follows:

"(1) Where a local authority, upon consideration of an official representation, or a report from any of their officers, or other information in their possession, are satisfied that any house . . . is in any respect unfit for human habitation, they shall, unless they are satisfied that it is not capable at a reasonable expense of being rendered so fit, serve upon the person having control of the house a notice requiring him, within such reasonable time, not being less than twenty-one days, as may be specified in the notice, to execute the works specified in the notice and stating that, in the opinion of the authority, those works will render the house fit for human habitation. (2) In addition to serving a notice under this section on the person having control of the house, the local authority may serve a copy of the notice on any other person having an interest in the house, whether as freeholder, mortgagee, lessee, or otherwise. (3) In determining for the purposes of this Part of this Act whether a house can be rendered fit for human habitation at a reasonable expense, regard shall be had to the estimated cost of the works necessary to render it so fit and the value which it is estimated that the house will have when the works are completed. (4) For the purposes of this Part of this Act, the person who receives the rack-rent of a house, whether on his own account or as agent or trustee for any other person, or who would so receive it if the house were let at a rack-rent, shall be deemed to be the person having control of the house. In this sub-section the expression 'rack-rent' means rent which is not less than two-thirds of the full net annual value of the house."

In the present case a notice under s. 9 (1) was served by the local authority on the landlord in respect of the kitchen floor of No. 3, Burlington Road, Thornton Heath. The landlord owns the freehold of the house, which is let on a yearly tenancy at a rent of £45 per annum exclusive of rates, the tenant being liable for internal, and the landlord for external, repairs. The house is within the Rent Restrictions Acts. It was let in 1914 for £35 and the rent of £45 represents that sum plus the increases permitted under the relevant Acts. It is common ground that the rent of £45 is less than two-thirds of the net annual value on the hypothesis that there were no statutory restrictions on the rent. On that hypothesis, therefore, the landlord would not be receiving a rack-rent. There would remain the question whether he was within the latter words of s. 9 (4) as the person who would receive the rack-rent if the house were so let.

It is clear, in the first place, that the section is not concerned with the liability as between the person having control and a lessee for the repairs required by the notice. If there is a lessee who is liable under covenant for the repairs in question, the person having control is required to do them and left to exercise any remedy he may have under the covenant to recoup himself. The learned county court judge held that the Rent Restrictions Acts could not be treated as relevant to the meaning of the words "rack-rent" as defined, and he was led to this conclusion by the reasoning of the House of Lords in *Poplar Metropolitan Borough Assessment Committee v. Roberts* (1). He, therefore, held, first, that the landlord was not in receipt of a rack-rent. He further held that the landlord was not the person who would receive the rack-rent if the house were so let. The notice was, therefore, improperly served. With respect, I have come to a different conclusion.

(1) 86 J.P. 137; [1922] 2 A.C. 93; *reversing, s.c. sub nom. Roberts v. Poplar Assessment Committee*, [1922] 1 K.B. 25.

The first question turns on whether, in arriving at the "Full net annual value" in the context of s. 9 (4), one has to have regard to the limitations placed by the Rent Acts on what is recoverable by the landlord as rent in respect of the annual value. The *Poplar* case (1), to which the learned county court judge referred, was relied on by each party to the appeal. Counsel for the landlord relied on the decision and counsel for the local authority on the reasoning. In that case the courts had to consider the effect of the Rent Acts on the application of the definition of "gross value" in the Valuation (Metropolis) Act, 1869, s. 4, which is as follows:

"The term 'gross value' means the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for an hereditament, if the tenant undertook to pay all usual tenant's rates and taxes . . . and if the landlord undertook to bear the cost of the repairs and insurance, and the other expenses, if any, necessary to maintain the hereditament in a state to command that rent."

It is unnecessary to consider whether, apart from the Rent Acts, the definition would, in respect of any particular premises, lead to the same figure as "full net annual value". The definitions are both dealing with the value of premises. The Divisional Court and this court, by a majority, held that the "gross value" of a house to which the Rent Acts applied could not be greater than the standard rent together with the permitted increases. The first relevant question in the Case Stated was whether the Rent Acts were to be taken into account, and the second question was whether the highest gross value which could be placed was the standard rent plus permitted increases. ATKIN, L.J., who was of the majority, dealt with these two questions as follows:

"Applying the principles discussed above to the present case, the first question to be answered . . . is . . . whether the said Rent (Restrictions) Act, 1920, in its application to the said hereditament is to be taken into account in arriving at the valuation of the said hereditament under and for the purposes of the Valuation (Metropolis) Act, 1869? In my opinion this question only admits of an affirmative answer. 'The problem is to ascertain, according to the statute, what a tenant from year to year might reasonably be expected to give as rent. For the solution of that problem it appears to me that apart from the decisions, as to which I will say a word presently, all that could reasonably affect the mind of the intending tenant ought to be considered'. That is from the judgment of LORD HALSBURY in *Cartwright v. Sculcoates Union* (2). To suggest that in the present time the mind of an intending tenant of a house to which the Rent (Restrictions) Act applies would not be reasonably affected by the provisions of the Rent (Restrictions) Act appears to me to border upon the ridiculous. I have already said that in my view the decisions so far from indicating a contrary view affirm the necessity of taking such provisions into consideration. I need say no more upon this question. The second question . . . is whether the highest gross value which can be assigned to and placed on the said hereditament . . . is the standard rent plus the highest increases of rent provided for in s. 2 (1) (c) and (d), of the [Increase of Rent, etc., Act, 1920]? In my opinion, the answer is again in the affirmative. I have already referred to *Sculcoates Union v. Kingston-upon-Hull Dock Co.* (3), which seems to

(1) 86 J.P. 137; [1922] 2 A.C. 93; *reversing s.c. sub nom. Roberts v. Poplar Assessment Committee*, [1922] 1 K.B. 25.

(2) 64 J.P. 229; [1900] A.C. 150.

(3) 59 J.P. 612; [1895] A.C. 136.

me to admit of but one answer to this question. If no higher rent than the standard rent and statutory increases is enforceable, as a matter of common sense that seems to be the limit of the rent a tenant can be reasonably expected to give. But it is suggested the tenant is not prohibited from giving or the landlord from receiving more than the standard rent; all that is provided is that the excess shall not be enforceable; the assessment committee may consider that the demand for houses may lead the willing tenant to offer and the landlord to accept an increase above the standard rent which both parties will know to be unenforceable but which will still be paid; and in this particular case, seeing that a large premium was recently paid for the lease, it is said that such an agreement might readily be inferred. I think that the answer is that when the Valuation (Metropolis) Act speaks of rent it means rent, a sum legally enforceable; and is not contemplating a sum legally enforceable plus a voluntary gift; still less a voluntary gift which after payment can at any time be recovered back."

Those last words refer to s. 14 (1) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The House of Lords reversed that decision. They decided that the gross value was not limited to the standard rent plus increases, and that the Rent Act was not to be taken into account. LORD CARSON dissented on both points, and LORD SUMNER, who agreed on the first point, expressed no opinion on the second.

Counsel for the landlord relies on this decision. On the face of it, it would seem to assist him. In applying a somewhat similar formula the Rent Acts were disregarded. Counsel for the local authority, as I have said, relies on the reasoning which, he submits, assists his case. I have come to the conclusion that a study of the reasoning in relation to the passage I have cited from ATKIN, L.J., supports the local authority in this appeal. It is, I think, desirable to cite the relevant passages from the speeches rather than seek to summarise them. LORD BUCKMASTER said:

"It is round the true meaning of this section that the dispute centres. The tenant referred to is, by common consent, an imaginary person; the actual rent paid is no criterion, unless, indeed, it happens to be the rent that the imaginary tenant might reasonably be expected to pay in the circumstances mentioned in the section. But although the tenant is imaginary, the conditions in which his rent is to be determined cannot be imaginary. They are the actual conditions affecting the hereditament at the time when the valuation is made. This was stated by this House in *Port of London Authority v. Orsett Union Assessment Committee* (1), and I do not think that the language which I there used needs to be modified or explained; but those words related entirely to determining the value of the occupation to the occupier, excluding, of course, any element due to his skill, industry, or other strictly personal qualifications. In the present case the respondent seeks to introduce into these words the conditions which regulate the value of the hereditament to the landlord. So far as the occupier is concerned, the provisions of the Rent Restrictions Act have not in any way made his occupation less beneficial. It is the landlord who is affected, and he, as landlord, is not the subject of assessment, nor can his interest in the property be considered for the purpose of determining what that assessment should be. If, however, the rent which has to be ascertained under the section is the real rent, then the fact that that cannot be increased will have a material effect upon the valuation. I agree, however, with what was

(1) 84 J.P. 69; [1920] A.C. 273.

said by counsel for the appellants that so to interpret the statute would be to deal with something which was nothing but a measure of value in such a manner as completely to destroy the very object for which that measure was set up. Just as the tenant is hypothetical, so also is the rent; it is only used as a standard which must be examined without regard to the actual limitation of the rent paid by virtue of covenant as between landlord and tenant, and also, as I regard it, to statutory restrictions that may be imposed upon its receipt. From the earliest time it is the inhabitant who has to be taxed. It is in respect of his occupation that the rate is levied, and the standard in the Act is nothing but a means of finding out what the value of that occupation is for the purposes of assessment. In my opinion, the rent that the tenant might reasonably be expected to pay is the rent which, apart from all conditions affecting or limiting its receipt in the hands of the landlord, would be regarded as a reasonable rent for the tenant who occupied under the conditions which the statute of 1869 imposes."

LORD BUCKMASTER then found support for his conclusion in the cases dealing with local authorities, statutory undertakers, and charitable trusts, which had held that premises could be rated although they could not be let.

LORD ATKINSON also referred to and relied on these cases, and the ratio of his opinion is, I think, summarised in the following sentences:

"What the ratepayer is, under both the [Parochial Assessments] Act of 1836 and [the Valuation (Metropolis) Act] of 1869, rated in respect of is decided by many cases in this House to be the beneficial occupation of a hereditament. And if he is in enjoyment of this species of occupation, he must be rated, even though he should not be a tenant of the hereditament, and though no person could be made the tenant of it, and though no rent is or could be received in respect of it."

LORD SUMNER said:

"Rating is a process between an occupier and a rating authority, to the determination of which the landlord and the lessee are strangers. It may be observed that the phrase is 'might be expected to pay'; it does not go on to say 'and the landlord might be able to exact'. If, as is contended, 'rent' is throughout rigidly restricted to its meaning as a term of art, and the measure of value thus applied by hypothetical hands is the real thing, the result would be that the occupier, who already has been enriched under the Rent Restrictions legislation by receiving a statutory present of part of the value of his landlord's property, would profit still further and equally unmeritoriously by escaping from the rates, which the hereditament ought to bear, to the prejudice of other less fortunate occupiers. I say 'ought to bear', because the only justification for the restriction is that the hereditament is really worth more by the year in the market than the landlord is allowed to charge, but that it is inexpedient that he should have the benefit of it."

It is, perhaps, to be noted in passing that the definition in the Parochial Assessment Act, 1836, s. 1 (now to be found in s. 68 (1) of the Rating and Valuation Act, 1925), which has been held to be identical in meaning with the definition in s. 4 of the Act of 1869: *London County Council v. Erith Parish (Churchwardens, etc.)* (1); was differently worded. It referred to "the rent at which [a hereditament] might reasonably be expected to let . . ." It would be

(1) 57 J.P. 821; [1893] A.C. 562.

wrong, therefore, to regard LORD SUMNER's opinion as based on the fact that the definition in the statute under consideration was worded in the other sense.

LORD PARMOOR said:

"Under 43 Eliz. c. 2, rates are to be levied upon every occupier of lands, houses, etc. The distinction between occupier and owner, in this connection, is of primary importance. The occupation value of property may be, and often is, distinct from its value to the owner. This distinction would probably be emphasised where an artificial statutory maximum is fixed, and a statutory restriction prevents an owner from recovering from any tenant a greater amount, as rent, than the statutory maximum. It has long been recognised that actual rents based on the contractual relationship between tenant and landlord are not the test of the value of a property for rating purposes. I do not think that there is any difference in this respect between a contractual or a statutory rental."

This reasoning seems to me to support the local authority's argument. The present section is, in the first instance, in search of an actual landlord receiving an actual rent. His interest is clearly affected by the Rent Acts, as is emphasised in the passages I have cited. The observations in the judgment of ATKIN, L.J., did not prevail because rating is concerned with value, not to the landlord, but to the occupier. The section with which we are dealing is concerned with value to the landlord. If Parliament limits that value, then that limitation must, in my opinion, operate on the "full net annual value" of the house for the purpose of the definition.

Reliance was sought to be placed on a line of reasoning which is to be found in the dissenting judgment of BANKES, L.J., and was approved by LORD BUCKMASTER in the last sentence of his speech. BANKES, L.J., suggested that one could take into account voluntary payments which a tenant might make in excess of the standard rent. None of the other noble and learned Lords expressed approval of that line of reasoning, and it was not the primary ratio of LORD BUCKMASTER's opinion. I agree with what ATKIN, L.J., said with regard to this in the passage I have cited.

Counsel for the landlord emphasised that an owner may realise the full value in many ways. He may occupy himself, he may have a service occupancy or tenancy, he may sell the house with vacant possession, and so on. The answer to this argument is that the part of the section which I am now considering is operating on a tenancy and the quantum of the actual rent being paid. It pre-supposes actual conditions in which the Rent Acts control the rent to be paid, that is, the value to the landlord. Reliance was placed on the word "full". It would be remarkable, if the Rent Acts would otherwise be applicable, that their operation should have been excluded, not by saying so, but by the word "full". The word, I think, is natural as making clear that the proportion is to be a proportion of the highest figure which could reasonably express the net annual value. Counsel also submitted that, if the local authority succeeded, the court would be construing substantially similar formulae in one way in one Act and in one way in another. I find no difficulty about this for the reason given in the passage which I have cited from LORD SUMNER's speech. Both Acts are concerned with value. The Rent Acts control and restrict the value to the landlord with which we are concerned, while leaving unaffected the value to the occupier with which rating is concerned.

In the present case, therefore, I come to the conclusion that the "full net annual value" was £45, and, as this was the amount of the rent the landlord was receiving, he was receiving a rack-rent and the notice was properly served

on him. It was argued for the local authority that, assuming they were wrong on the first point, the landlord was the person who "would so receive it", that is, a rack-rent "if the house were let at a rack-rent" as provided by s. 9 (4). We were referred on the other side to *Truman, Hanbury, Buxton & Co. v. Kerslake* (1). That dealt with similar words in a definition of "owner" in the Public Health (London) Act, 1891, s. 141. In that case there was a lease for thirty-nine years at a rent which was not a rack-rent. It was held by the Divisional Court that, as the lessee had power to let at a rack-rent, he was the person who would receive the rack-rent if the premises were so let. All I wish to say on that point is that it would not, I think, necessarily apply to a tenant of rent restricted premises. On the hypothesis that the standard rent with increases is not a rack-rent, the tenant could not himself let at a rack-rent. I find it unnecessary to pursue what the consequences would be because, if I am right in my conclusion on the first point, the question does not arise here and seems unlikely to arise in other cases. For the reasons I have given I would allow the appeal.

DENNING, L.J.: We are here concerned with a dwelling-house to which the Rent Acts have applied ever since they first started in 1915. The rent in 1914 was £35 a year which has been raised by permitted increases to £45 a year. No more rent can be recovered for the house so long as it is let unfurnished as a separate dwelling. £45 is the maximum rent which can be charged, or, at any rate, recovered, for it. The kitchen floor is now in a bad condition. It is affected by dry rot. As between landlord and tenant it is clear that the tenant ought to repair it, because the tenancy is on the terms that the tenant is liable for internal repairs. But the tenant has done nothing about it. The house is unfit for human habitation, and the local authority have decided that it must be made fit. In order to get the work done they have served a notice on the landlord requiring him to repair it. The landlord says that the notice ought to be served, not on him, but on the tenant. He says that the rent he gets for the house is so low that he is no longer "the person having control of the house", and that, if anyone has control, it is the tenant and not the landlord. The county court judge has accepted this contention. The local authority appeal to this court.

The county court judge based himself on a case which decided that the Rent Acts are to be ignored in assessing rateable value. It is *Poplar Metropolitan Borough Assessment Committee v. Roberts* (2). I do not think that case has any application to the present case. Rating concerns the value to the occupier, whereas we are here concerned with the value to the landlord. The law requires those who assess rateable value to have a lively imagination. They have to picture this country as a land which is inhabited by tenants, who are not real but hypothetical, and where the Rent Acts do not exist. The law does not require anything so far-fetched in the case of the Housing Acts. The local authority have to take every house as it is. If it is occupied by a tenant who is paying a rack-rent, then the person who in fact receives the rent is the person in control of the house. If it is occupied by the owner, then he is the person in control, because he is the person who would receive the rent if it was let at a rack-rent. If the house is one which is within the Rent Acts, regard must, I think, be had to that fact. The "full net annual value of the house" is not to be calculated as if the Rent Acts did not exist. It is the full amount which a landlord can reasonably be expected to get from a tenant. He cannot reasonably be expected to get more than the Rent Acts permit. If he receives the full permitted amount,

(1) 58 J.P. 766; [1894] 2 Q.B. 774.

(2) 86 J.P. 137; [1922] 2 A.C. 93; *reversing a.c. sub nom. Roberts v. Poplar Assessment Committee*, [1922] 1 K.B. 25.

he is receiving the full annual value. He is receiving a rack-rent and is the person having control of the house. Any other view would lead to an impossible situation. If the Rent Acts are to be treated as non-existent, the annual value of the house would soar far above the restricted rent which the tenant is paying. The landlord would then not be the person having control of the house, because he would not be receiving a rack-rent. Who, then, would be in control of the house? Can it be said that the tenant would be the person having control? Is he the person who would receive the rack-rent if it was let at a rack-rent? That needs a great stretch of imagination, because the fact is that the tenant himself cannot sub-let the house at more than the permitted amount; and if he is a statutory tenant, he cannot sub-let it at all, that is, not as a whole. Faced with these difficulties, counsel for the landlord suggested that there might be no one in control of the house and referred us to what BOWEN, L.J., said in *Wright v. Ingle* (1). But if there was no person having control we would get to the absurd position that the Housing Acts would be inoperative in the case of houses which were within the Rent Acts because there would be no one on whom the local authorities could serve the necessary notices. Parliament cannot have intended any such result when they passed the Housing Act, 1936. At that time there were still many small houses—class C. houses—still within the Rent Acts, and it was very important that the landlords should keep them reasonably fit for human habitation. Parliament can never have intended to release the landlords of their responsibilities in respect of them.

The judge relied on *Truman, Hanbury, Buxton & Co. v. Kerslake* (2), but I think that case turned a good deal on its special facts. It should not be regarded as laying down a broad principle which has been subsequently sanctioned by Parliament: see *Royal Crown Derby Porcelain Co., Ltd. v. Russell* (3). If a landlord out of generosity or friendship chooses to let a house to an occupier at less than a rack-rent, I should have thought that the landlord would ordinarily be the person having the control of the house because he is the person who would receive a rack-rent if it were let at a rack-rent. So, here, if, contrary to my opinion, the rent which is paid is not a rack-rent, then I think that the landlord is the person who would receive a rack-rent if the house were let at a rack-rent, because, if the restrictions imposed by the Rent Acts were removed, he is the person who would receive the full rent.

My conclusion is that the local authority can compel the landlord to do the necessary repairs. The landlord has theoretically a right over in damages against the tenant for not repairing, or a ground for claiming possession, because the tenant was under an obligation to do the repairs and has not done them. But that does not affect the right of the local authority to compel the landlord to do it. It is no doubt hard on private landlords that they should be compelled to do repairs at greatly increased cost and not be allowed to increase the rent, but that is a matter for Parliament and not for us. I agree that the appeal should be allowed.

ROMER, L.J.: I agree that this appeal should be allowed. Section 9 (4) of the Housing Act, 1936, provides that for the purposes there relevant

"the person who receives the rack-rent of a house . . . or who would so receive it if the house were let at a rack-rent, shall be deemed to be the person having control of the house."

(1) (1885), 50 J.P. 436; 16 Q.B.D. 379.

(2) 58 J.P. 766; [1894] 2 Q.B. 774.

(3) [1949] 1 All E.R. 749; [1949] 2 K.B. 417.

The term "rack-rent" was defined in BLACKSTONE'S COMMENTARIES, 4th ed., vol. 2, p. 43, as "a rent of the full value of the tenement, or near it". SWINFEN EADY, L.J., described it in *Gundry v. Dunham* (1) as

"the value at which the premises are worth to be let by the year in the open market—that is to say, what a tenant, taking one year with another, may fairly and reasonably be expected and required to pay."

The words "and required" are not without importance in relation to the present case. The definition of rack-rent in s. 9 (4) does not disturb this long-accepted understanding of the term in attributing to it the meaning of "the full net annual value of the house" but, for the purposes of the section, reducing such annual value by one-third. The fundamental characteristic, therefore, of the person who is rendered liable, in the first instance, to the charge imposed by the section is that he should be in receipt of two-thirds of the rack-rent, according to what is, in effect, the ordinary acceptance of that term, of the premises to which the charge relates.

The landlord contends, in effect, that this rack-rent is to be ascertained, so far as rent-controlled houses are concerned, by an estimate of what the houses would yield each year if the Rent Restrictions Acts had never been passed. Alternatively, he argues that the full annual value of controlled houses in the hands of the owners may exceed the standard rents of such houses if the standard rents have to be taken into account. Taking the second point first, it was illustrated in argument by the following example. A man who owns a rent-controlled house lets it for occupation at the standard rent to a servant who works for him. In such a case, it is said, the annual value of the house to the owner is greater than the amount represented by the standard rent for, by reason of the occupation, he gets the services in addition. So he does, but the services are not "rent", and it is by reference only to rent, as I have already pointed out, that, by the language of the section itself, the annual value of the house is to be assessed. I am, accordingly, unable to accept the argument of the landlord so far as this point is concerned.

The first point was mainly based on *Poplar Metropolitan Borough Assessment Committee v. Roberts* (2). I have had the advantage of reading the judgment which my Lord has delivered and I entirely agree with what he has said on this aspect of the case. In the Court of Appeal ATKIN, L.J., considered the language of the statute which was there in question in the light of its assumed applicability to the relationship of landlord and tenant, and, on that hypothesis, expressed his conclusions in a manner which militates strongly against the landlord's argument on the present appeal. The House of Lords in no way differed from or overruled the lord justice's reasoning, but said that the correct approach to the question of value for the purposes then under discussion was not, as here, what the property was worth to a landlord, but what the right of occupation was worth to the occupier. I, accordingly, agree that the views of ATKIN, L.J., in the *Poplar* case (1) may be regarded as authority against the present landlord.

Then it was contended that the word "full" in the section is the opposite of "restricted" and that this shows that the legislature had in mind what the learned judge described as the economic rent rather than the controlled rent. As to this, it is true that a burden is imposed by the section and that the word "full" (as, indeed, the term "rack-rent" itself) does suggest that the burden was only intended to be borne by a person who was in receipt of an economic or

(1) (1915), 85 L.J.K.B. 417; 114 L.T. 106.

(2) 86 J.P. 137; [1922] 2 A.C. 93; *reversg. s.c. sub nom. Roberts v. Poplar Assessment Committee*, [1922] 1 K.B. 25,

profit rental. But this consideration cannot in itself nullify the effect which the Rent Acts would otherwise have on the position. When the legislation was first introduced into our economic and social system, and it may be for some considerable time thereafter, landlords still received a profit rental although they were in the main precluded from increasing it. The general trend of the legislation has long since resulted in landlords only receiving rentals which are usually a great deal less than those received by owners of equivalent, but uncontrolled, properties. Nevertheless, this change cannot alter the fact that landlords who are affected by the legislation are undoubtedly receiving the full rent which their properties are capable of yielding, in the sense that they are receiving the maximum which is permitted by the law. In other words, they are receiving the "rack-rents" of their premises. The argument to the contrary overlooks the fact that value is not an absolute, but a relative, conception. The value of any particular thing can only be ascertained in the light of circumstances which affect or control its disposability. For example, the apparent owner of property might have some defect in his title which would lessen its selling value below that of another similar property the title to which was flawless. Similarly, in the present case the rack-rent or annual value of the property in question is conditioned by the fact that its owner cannot increase its annual yield beyond the permitted maximum. In my opinion, the legislature, in s. 9, was applying itself to a factual and not to a hypothetical position. If the standard rent is the greatest rent that is obtainable in respect of any particular premises, then it is the full rent of those premises, the rack-rent, notwithstanding that (and, indeed, because) the owner is restricted from receiving the higher rent which the premises, if uncontrolled, would command.

On the second question which was argued before us no decision is necessary having regard to our views on the first question, but I agree with the observations which my brethren have made on it.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *E. Taberner*, town clerk, Croydon (for the local authority); *A. Rawlence* (for the landlord).

G.F.L.B.

CHANCERY DIVISION

(UPJOHN, J.)

July 25, 28, 1952

EALING BOROUGH COUNCIL v. MINISTER OF HOUSING AND LOCAL GOVERNMENT AND OTHERS

Town and Country Planning—Purchase notice—Confirmation—Service of notice on borough council—Minister's notice of proposed action to confirm purchase notice without modification—No hearing before person appointed by Minister—Informal meeting between Minister, planning authority, and borough council—Substitution of planning authority for borough council as acquiring authority in purported confirmation of purchase notice—Town and Country Planning Act, 1947 (10 and 11 Geo., c. 51), s. 19 (3) (5).

A county council, as local planning authority, having refused an application under the Town and Country Planning Act, 1947, for permission to develop a piece of land, the landowner, on Nov. 30, 1950, served a purchase notice under s. 19 (1) of the Act on the council of the borough in which the land was situated requiring them to purchase the land. On Dec. 11, 1950, the borough council, pursuant to s. 19 (2), sent a copy of the purchase notice to the Minister, and on Mar. 13, 1951, the Minister, under s. 19 (5), gave notice to the parties of his proposed action to confirm the purchase notice without modification. The planning authority desired to purchase the land for the erection of a school, but they had failed to reach any agreement with the borough council. On May 16, 1951, an informal meeting was held at which the views of both parties were presented to one of the Minister's officers, but the landowner was given no notice of this meeting and there was no hearing before a person appointed by the Minister within the meaning of s. 19 (5). The Minister issued his confirmation of the purchase notice on May 21, 1951, but modified it by substituting the planning authority as the acquiring authority in lieu of the borough council as named in the purchase notice.

HELD: the purported confirmation of May 21, 1951, was ultra vires and void. On the true construction of s. 19 as a whole, confirmation of a purchase notice without qualification meant confirmation of the purchase notice in whole and not in part, and, if the Minister intended to modify the purchase notice by substituting the planning authority for the local authority named in the purchase notice, this must be stated in his notice of proposed action under s. 19 (5). As the notice of proposed action of Mar. 13, 1951, to confirm without modification, implied that the borough council was to be the acquiring authority and as there had been no hearing under s. 19 (5), the Minister could not change his proposed action in his confirmation order. As the period of six months from the date of the purchase notice expired on May 30, 1951, under s. 19 (3) the purchase notice was deemed to be confirmed as from that date, and, accordingly, the borough council was authorised to acquire the land.

ACTION by the Ealing Borough Council for a declaration that the confirmation by the Minister of Housing and Local Government on May 21, 1951, of a purchase notice, dated Nov. 30, 1950, in purported exercise of the powers conferred on him by the Town and Country Planning Act, 1947, s. 19 (2), was ultra vires and void, and for consequential relief.

The purchase notice was served on the plaintiff council by the third defendant, Henry Boot and Sons, Ltd., under s. 19 (1) of the Act and required the plaintiff council to purchase the third defendant's interest in certain land. In his notice of proposed action, dated Mar. 13, 1951, the Minister stated that he proposed to confirm the purchase notice without modification, but his confirmation on May 21, 1951, contained the modification that the second defendants, Middlesex County Council (the planning authority), should be substituted for the plaintiff council as the acquiring authority. The plaintiff council contended, inter alia, that, as there was no hearing before a person appointed by the Minister for the

purpose, within s. 19 (5) of the Act, the Minister had no power to alter his "proposed action".

Mitchison, Q.C., and Squibb for the plaintiff council.

Harold Christie, Q.C., and Denys B. Buckley for the first defendant, the Minister of Housing and Local Government.

Harold Williams, Q.C., and W. B. Harris for the second defendants, **Middlesex County Council.**

Kerrigan for the third defendant, **Henry Boot and Sons, Ltd.** (the landowner).

UPJOHN, J.: The third defendant in this action, Henry Boot and Sons, Ltd., to whom I shall refer as "the company", was at all material times the owner of a piece of land of about seven acres, situated in the district of the plaintiff council. This land was referred to in the action as the Princess Helena College site, and I shall refer to it as "the site". In the summer of 1950 the company applied for permission under the Act to develop the site by the erection of fifty flats thereon. On July 4, 1950, the permission was refused by the second defendants, Middlesex County Council, who are the local planning authority for the purposes of the Act. In those circumstances, if the company could satisfy certain conditions laid down in s. 19 (1) of the Act, it became entitled to give what is called in the section a "purchase notice", directed to the plaintiff council and requiring them to purchase the land.

Section 19 (1) of the Act provides:

"Where permission to develop any land is refused, whether by the local planning authority or by the Minister [now designated the Minister of Housing and Local Government], on an application in that behalf made under this Part of this Act, or is granted by that authority or by the Minister subject to conditions, then if any owner of the land claims—(a) that the land has become incapable of reasonably beneficial use in its existing state; and (b) in a case where permission to develop the land was granted as aforesaid subject to conditions, that the land cannot be rendered capable of reasonably beneficial use by the carrying out of the permitted development in accordance with those conditions; (c) in any case, that the land cannot be rendered capable of reasonably beneficial use by the carrying out of any other development for which permission has been or is deemed to be granted under this Part of this Act, or for which the local planning authority or the Minister have undertaken to grant such permission, he may, within the time and in the manner prescribed by regulations made under this Act, serve on the council of the county borough or county district in which the land is situated a notice (hereinafter referred to as a 'purchase notice') requiring that council to purchase his interest in the land in accordance with the provisions of this section."

It is not in dispute that the conditions set out in para. (a) and para. (b) of the sub-section have been fulfilled and that the company was entitled to serve a notice under the sub-section. It did so by a letter, dated Nov. 30, 1950, and addressed to the clerk to the plaintiff council. The notice is in these terms:

" . . . we hereby give notice that we require the Ealing Borough Council to purchase our freehold interest in the said land, under s. 19 of the Town and Country Planning Act, 1947."

On receipt of the notice, the provisions of s. 19 (2) come into play. The subsection reads:

"Where a purchase notice is served on any council under this section,

that council shall forthwith transmit a copy of the notice to the Minister, and subject to the following provisions of this section the Minister shall, if he is satisfied that the conditions specified in para. (a) to para. (c) of the foregoing sub-section are fulfilled, confirm the notice, and thereupon the council shall be deemed to be authorised to acquire the interest of the owner compulsorily in accordance with the provisions of Part IV of this Act, and to have served a notice to treat in respect thereof on such date as the Minister may direct: provided that . . . "

Section 19 (2) (a) provides that the Minister may grant permission for the development, and s. 19 (2) (b) provides that the Minister may grant permission for some other development. Section 19 (2) (c) is in these terms:

" if it appears to the Minister, having regard to the probable ultimate use of the land, that it is expedient so to do, he may, if he confirms the notice, modify it, either in relation to the whole or in relation to any part of the land to which it relates, by substituting any other local authority for the council on whom the notice is served, and in any such case the foregoing provisions of this sub-section shall have effect accordingly."

As required by s. 19 (2), the plaintiff council transmitted a copy of the purchase notice to the Minister, the first defendant, on Dec. 11, 1950, and also sent a copy to the county council.

Section 19 (3) is in these terms:

" If within the period of six months from the date on which a purchase notice is served under this section the Minister has neither confirmed the notice nor taken any such other action as is mentioned in para. (a) or para. (b) of the last foregoing sub-section, nor notified the owner by whom the notice was served that he does not propose to confirm the notice, the notice shall be deemed to be confirmed at the expiration of that period, and the council on whom the notice was served shall be deemed to be authorised to acquire the interest of the owner compulsorily in accordance with the provisions of Part IV of this Act, and to have served notice to treat in respect thereof at the expiration of the said period."

Section 19 (5), which is the important sub-section, is in these terms:

" Before confirming a purchase notice, or taking any other action in lieu thereof, under this section, the Minister shall give notice of his proposed action—(a) to the person by whom the notice was served; (b) to the council on whom the notice was served; (c) to the local planning authority for the area in which the land is situated; and (d) to any other local authority whom the Minister proposes, under the foregoing provisions of this section, to substitute for the said council; and if within the period prescribed by the notice under this sub-section (not being less than twenty-eight days from the service thereof) any person or authority on whom that notice is served so requires, the Minister shall, before confirming the purchase notice or taking any such other action as aforesaid, afford to those persons and authorities an opportunity of appearing before and being heard by a person appointed by the Minister for the purpose."

As required by s. 19 (5), the Minister sent notice of his proposed action to the parties concerned. The notice to the plaintiff council, which is addressed to the clerk to the council and is dated Mar. 13, 1951, is in these terms:

" Sir, Town and Country Planning Act, 1947, Purchase Notice in respect of Princess Helena College Site, Ealing. I am directed by the Minister of

Local Government and Planning to refer to your letter of Dec. 11, 1950, and to say that he has now given consideration to the grounds for the purchase notice served on your council under s. 19 of the Act in respect of the interest held by Henry Boot and Sons, Ltd., in land forming the site of Princess Helena College, Ealing. The Minister is satisfied that the land has become incapable of reasonably beneficial use in its existing state; and having regard to the proposed reservation of the land for either open space or educational purposes he does not consider that he would be justified in reversing the planning authority's decision that flats should not be erected on the site, or in directing that permission should be granted for any other development. He accordingly proposes, unless notified by Apr. 13, 1951, that your council, the Middlesex County Council, or the servers of the notice desire an opportunity of being heard by a person appointed by him for that purpose, to confirm the notice without modification. This letter, which is in similar terms to those sent at the same time to the Middlesex County Council and Henry Boot and Sons, Ltd., the servers of the notice, is issued by the Minister, in accordance with s. 19 (5) of the Act, as the formal notice of his proposed action."

The time when the notice could be given under s. 19 (5) of a desire for

" . . . an opportunity of appearing before and being heard by a person appointed by the Minister . . . "

expired on Apr. 13. On Apr. 12 the plaintiff council sent a letter to the Minister, saying that they had no observations to make on the Minister's proposal to confirm the purchase notice without modification. On the next day the county council caused the following letter to be delivered by hand to the Minister:

"With reference to your letter of Mar. 13, I would inform you that a conference will be held on Apr. 19 between representatives of the county council and the Ealing town council to determine the future use of the above land. The decision reached will also determine whether the land the subject of the purchase notice should be acquired by the county council or the town council. In these circumstances I am to inform you that the county council desires an opportunity of being heard by the Minister's representative before the purchase notice is confirmed."

For some months previously there had been discussions between the plaintiff council and the county council in regard to the future use of the site. The plaintiff council wanted to use it as a public open space, while the county council wished to erect a school on it. No agreement was reached by the councils at the meeting of Apr. 19, 1951, and on Apr. 20 a letter on behalf of the county council was sent to the Minister informing him of that fact. The letter went on to say:

"I am, accordingly, to request that the views of the county council may be heard by a person appointed by the Minister for that purpose before the purchase notice is confirmed."

A copy of the letter was sent to the plaintiff council. On Apr. 26 the following letter was written on behalf of the county council to the Minister:

"I have to refer to my letter to you of [Apr. 20] regarding the above matter. The county council, in refusing consent for development proposed by Henry Boot and Sons, Ltd., intimated that the development plan would reserve the land for either open space or educational purposes. The county council wishes to ensure that the purchase notice shall be confirmed but that the name of the authority which will develop the site shall be inserted in the

notice as the acquiring authority. In order that the Minister shall be fully informed in the matter, the county council accordingly seeks an opportunity for its representatives to present their views to one of the Minister's officers, and for Ealing council to be similarly represented, before the Minister determines who shall be the acquiring authority for the purposes of the purchase notice. If the Minister is agreeable to convene such an informal conference I shall be glad if you will kindly regard the request contained in my letter of [Apr. 20] as withdrawn."

Although the last sentence referred to the letter of Apr. 20, which had been sent out of time, it was treated by all concerned, at the time, as referring to the letter of Apr. 13 and as constituting a withdrawal of the request, contained in that letter, for a hearing before a person appointed by the Minister pursuant to s. 19 (5), provided that the Minister was prepared to convene a meeting, as suggested in the letter of Apr. 26. This was agreed, and on May 9 the Ministry wrote a letter to the councils, confirming

" . . . that an informal meeting has been arranged for . . . May 16 with Mr. H. R. Pollitzer in the chair, to discuss the above subject between representatives . . . "

of the two councils and of the Ministry of Education. No notice to attend the meeting was served on the company. The meeting duly took place, and the chairman heard the views of the parties who were represented. In his evidence before me, he said that in opening and closing the meeting he stressed its informal character. I am quite satisfied (and, indeed, counsel for the Minister conceded at the close of the evidence) that no one who was at that informal meeting on May 16 thought it was a hearing under s. 19 (5). Indeed, the fact that the county council had already withdrawn their request for a hearing, coupled with the terms of the notice of May 9 convening the meeting, together with the terms of the letter of May 21, in which the Minister issued his decision, render any other conclusion impossible.

The letter of May 21, which is addressed to the county council, is headed by a reference to the Town and Country Planning Act, 1947, and to the site. Paragraph 1 refers to the purchase notice, and para. 2 is in these terms:

" The Minister is satisfied that the conditions specified in s. 19 (1) (a) and (c) of the Act are fulfilled in the case of this land. He has given notice of his proposed action in accordance with s. 19 (5) and no request for a hearing has been received by him and not withdrawn within the period prescribed by the notice. The Minister has decided therefore to confirm the purchase notice."

That paragraph makes it plain that the Minister never thought that the informal meeting which was held on May 16 constituted a meeting under s. 19 (5). The letter continues:

" At your council's request an informal meeting was, however, agreed upon with the two councils concerned and was held at this office on May 16, 1951. On behalf of your council it was stated that it is their wish to acquire the site, which has an existing use right for educational purposes, and to erect upon it a primary school; they accordingly requested the Minister to modify the purchase notice by substitution of your council for Ealing Borough Council, on whom the notice was served."

After setting out the contentions of the town clerk of Ealing, which were to the

effect that the plaintiff council desired the site to be acquired as an open space, the letter continues:

"The Minister has carefully considered all the facts and representations before him and the probable ultimate use of the land; having consulted with the Minister of Education, he is in no doubt that the site would be most appropriately used for school purposes, whereas the open space need of this area is not particularly urgent. He has decided, therefore, that he must accede to your council's request. I am to inform you accordingly that it appears to the Minister, that it is expedient to modify the purchase notice in relation to the whole of the land to which it relates by substituting your council for the Ealing Borough Council (on whom the notice was served); the Minister directs accordingly that your council shall be deemed to have served today a notice to treat in respect of the interest of Messrs. Henry Boot and Sons, Ltd. in the land in question. This letter is issued as the Minister's formal confirmation of the above mentioned purchase notice. Copies of it have been sent to the town clerk of Ealing and to Messrs. Henry Boot and Sons, Ltd., the servers of the notice."

It is that formal decision which is challenged by the plaintiff council.

In a nutshell, the position at this time stood thus. (i) On Mar. 13, 1951, the Minister gave notice of his proposed action under s. 19 (5), viz., that he proposed to confirm the purchase notice without modification. (ii) In response to the Minister's notice, neither party gave any effective notice asking for an opportunity of appearing before and being heard by a person appointed by the Minister. (iii) There never was, in fact, such a hearing. (iv) After an informal meeting, which did not amount to such a hearing, the Minister purported to confirm the purchase notice, but modified it by making the county council the purchasing authority in lieu of the plaintiff council. The bona fides of the Minister in making this decision are not in question. The only question which I have to determine is whether in those circumstances the Minister made a valid order. The plaintiff council contended that, in giving notice of the proposed action to confirm the order, the Minister thereby showed his intention to confirm the compulsory purchase by the plaintiff council. Counsel for the plaintiff council submitted that, since the purchase notice, in accordance with the provisions of s. 19 (1), required the plaintiff council to purchase the land, confirmation of the notice by the Minister would confirm the whole of the notice and would entitle, and, indeed, bind, the plaintiff council to become the purchaser. Therefore (the argument runs) as there was no hearing under s. 19 (5), the Minister could not alter his proposed action and was bound to do what he said he was proposing to do, viz., confirm the purchase notice in favour of the plaintiff council. If the Minister changed his intention after issuing the notice of his proposed action in his letter of Mar. 13, then (counsel submitted) he should have given a new notice of proposed action so that the parties affected could invoke the provisions of s. 19 (5), if they so desired. Counsel for the plaintiff council relied on s. 32 of the Interpretation Act, 1889, and also on certain observations of LORD WRIGHT, M.R., in *With v. O'Flanagan* (1) by way of illustration of what was said to be a fundamental principle in this matter. It followed (said counsel) that, as the Minister had not complied with the provisions of s. 19 (5), his decision of May 21 was ultra vires and a nullity, and, if that were the case, he had not confirmed the purchase notice, or taken any action under s. 19 (2) (a) or (b), before May 30, 1951 (i.e., within six months from the date of the purchase notice), and, therefore,

(1) [1936] 1 All E.R. 727, 734; [1936] Ch. 575, 582.

the provisions of s. 19 (3) automatically came into play to confirm the notice in favour of the plaintiff council.

The contentions on behalf of the Minister (which were also adopted on behalf of the county council) were as follows. It was said, *inter alia*, that, under s. 19 (2) the Minister was under a duty either to confirm the purchase notice, with or without modification, or to take other action, under s. 19 (2) (a) or s. 19 (2) (b), and that, if he decided to confirm the purchase notice, his duty was directed essentially to the person giving the notice, and there was nothing in s. 19 which compelled the Minister to confirm in the sense of naming the local authority which was to acquire the site, that being a matter for subsequent administrative action by the Minister. It was then contended that, if the Minister decided to exercise his power by substituting the name of another local authority, under s. 19 (2) (c), it was not necessary to give any notice thereof to anyone or to give anyone an opportunity of being heard by a person appointed by him for that purpose. The local authorities (it was said) had no rights in the matter, and it was entirely a matter for the exercise of the discretion of the Minister. It was further contended that, if the Minister gave notice of proposed action, it was notice of his intention at the time when he expressed his intention as to his proposed action, and there was nothing to prevent him subsequently altering that intention, at any rate to the extent of a modification under s. 19 (2) (c), without giving further notice to the local authorities or affording them an opportunity of being heard, should they desire to be heard. Therefore, it was contended, the Minister had strictly carried out the duties cast on him by s. 19.

These contentions depend solely on the true construction of s. 19, but, before going to a consideration thereof, one or two general observations are pertinent. This section constitutes a serious inroad into the liberty of the subject, including in that term bodies who, like local authorities, are not emanations of the Crown, since it enables a disappointed holder of land to force a local authority to apply its public funds in the purchase of the land. In this case there was some competition between local authorities to become the owner of the site, but in many instances the reverse would be the case. Local authorities may well be loath to have to pay large sums for a site for which they have no use. When, therefore, provision is made in the section for persons to appear before the Minister's representative to express their views one would expect to find some provision entitling a local authority to make representations to the Minister on the question whether or not they should be compelled to purchase such a site. It would require clear words in the section to empower the Minister to force a local authority to purchase a site without giving them an opportunity of making representations on so important a subject, yet that is precisely what the Minister argues that s. 19 does, as he says that, in confirming the purchase notice, he need not designate the name of the acquiring authority. Similarly, where the Minister confirms a purchase notice requiring a particular local authority to purchase land situate within their district, it would seem strange if he could, without any notice to that local authority, remove them from being in the position of purchaser and substitute the local planning authority in their place, yet that is precisely what the Minister says that he can do.

In my judgment, s. 19 confers no such arbitrary and autocratic powers on the Minister. On the true construction of the section, if he confirms, without qualification, the purchase notice, which requires a named authority to purchase, he is, in my opinion, confirming the purchase notice in whole and not in part. That seems to me only common sense, but my conclusion is supported by the phraseology in s. 19 (3), which says that, in the circumstances set out in the

sub-section, the notice is to be deemed to be confirmed. That, plainly, means in whole and not merely vis-à-vis the person giving the purchase notice. If the action proposed by the Minister involves the substitution of a local authority other than the authorities mentioned in s. 19 (5) (b) and (c), it is clear from s. 19 (5) (d) that the Minister must state in his notice of proposed action that he is proposing to exercise his powers under s. 19 (2) (c) by substituting another local authority. In my judgment, he must also do so if he is proposing to modify the purchase notice by substituting the planning authority for the local authority named in the purchase notice. The whole object of compelling the Minister to inform the parties mentioned in s. 19 (5) (a) to s. 19 (5) (d) of his proposed action is, in my opinion, to enable each of the parties there named to know exactly where they stand in relation to the whole matter, so that they may consider whether to ask for an opportunity to appear before a person appointed by the Minister. The argument that the Minister need not name the acquiring authority is, in my opinion, contrary to the whole object and tenor of the sub-section, as, in that case, the persons who have been served with notice of his proposed action would not know which one of them is to be the acquiring authority and would have no opportunity of making representations to him on the point. In my judgment, therefore, the Minister's notice of proposed action must state expressly or by necessary implication the name of the acquiring authority.

In the present case, for the reasons which I have given, the notice of proposed action by necessary implication stated the name of the plaintiff council as the acquiring authority. There having been no hearing under s. 19 (5), is it open to the Minister, as was contended on his behalf, to change his proposed action when he makes his confirming order? In my judgment, the Minister cannot change his mind and make an order which may vitally affect the local authorities concerned. To hold that he could do so would nullify the whole object of s. 19 (5). It may be that, within the six months provided by s. 19 (3), the Minister might change his mind and give a new notice of proposed action, and thereby revive the rights of the parties under s. 19 (5), but I am not deciding this point, as it is not necessary for me to do so. The Minister cannot arbitrarily change his mind and make an order without having given an opportunity to the parties to exercise their rights under s. 19 (5). I propose to make a declaration that the purported confirmation, dated May 21, 1951, by the Minister of the notice, dated Nov. 30, 1950, is *ultra vires* and void. It, therefore, follows that the provisions of s. 19 (3) come into play, since the period of six months from the date of the purchase notice expired on May 30, 1951. The first defendant, the Minister of Housing and Local Government, must pay the costs of the plaintiff council and the company. I shall make no order as to the costs of the county council.

Judgment for the plaintiff council.

Solicitors: *Field, Roscoe & Co.*, agents for *E. J. C. Brown*, town clerk, Ealing (for the plaintiff council); *Solicitor, Ministry of Health* (for the first defendant); *C. W. Radcliffe*, clerk to Middlesex County Council (for the second defendants); *T. F. Peacock, Fisher, Chavasse & O'Meara* (for the third defendant).

R.D.H.O.

HAMPSHIRE SUMMER ASSIZES

(DEVLIN, J.)

July 11, 14, 15, 16, 1952

REG. v. MILLER

Criminal Law—Evidence—Character of prisoner—Question on behalf of one prisoner involving character of another—Application for separate trials.

A. B. and C. were indicted on a charge of conspiracy to evade customs duties. B.'s defence was that he was not concerned in the illegal acts, but that C. had masqueraded as him and used his office for the commission of the crimes. A witness for the Crown was asked in cross-examination by B.'s counsel whether C. was not in prison at a time when there had been a cessation of the crimes. C.'s counsel objected to the question and applied that C. should be tried separately.

HELD: (i) that the question was relevant and admissible in the circumstances, and (ii) there being prima facie evidence that B. and C. were fellow-conspirators, the interests of justice required that there should be a joint trial.

Per DEVLIN, J.: The principle that a question as to the character of an accused person is only admissible if it is relevant applies equally to questions put by counsel for a co-defendant as to those put by the prosecution. If in any case such a question is relevant and is put by counsel for a co-defendant that counsel ought to show, so far as is possible, the same restraint as would the prosecution and should confine his questions strictly to those required for the purpose of his case. Moreover, counsel should first inform counsel for the other accused person that he proposes to put the question.

TRIAL on indictment.

At Hampshire Assizes, before DEVLIN, J., and a jury, Alfred Miller, Nathan Mercado and Leonard Harris were charged on an indictment that between Jan. 1, 1949, and Oct. 6, 1951, they conspired together and with others fraudulently to evade duties of Customs payable on the importation of nylon stockings. At the trial evidence was tendered for the prosecution in respect of twenty-one importations, the first in February, 1949, and the last in September, 1951. The prosecution alleged that Miller started the illegal importations, conspiring with members of the crews of ships docking at Southampton, and that later he was joined in the conspiracy by Harris and Mercado. Between Nov. 28, 1949, and Sept. 16, 1950, Harris was serving a sentence of imprisonment for an offence unconnected with the present charges, and during that period there were no illegal importations. The defence of Mercado, as appeared from the cross-examination by his counsel of a witness for the prosecution, was that he was not concerned in the illegal importations, but that Harris, masquerading as Mercado, by whom he was employed, used Mercado's office for that purpose. In support of this defence and to show that Harris was primarily responsible for the importations, counsel asked the witness whether he was aware that Harris was in prison during a period when the importations were suspended. Counsel for Harris then applied for an order that the jury be discharged from giving a verdict in respect of Harris and that there should be a new trial with regard to him on the ground that his trial must be so prejudiced by the question asked by Mercado's counsel that that would be the proper course for the judge to take in the exercise of his discretion. The case is only reported on this point.

G. D. Roberts, Q.C., and S. A. Morton for the Crown.

Maude, Q.C., and J. N. Hutchinson for Miller.

Wooll, Q.C., H. H. Edmunds and Hobbs for Mercado.

Gillis and R. I. Gray for Harris.

DEVLIN, J.: The fundamental principle, equally applicable to any

question that is asked by the defence as to any question that is asked by the prosecution, is that it is not normally relevant to inquire into a man's previous character, and, particularly, to ask questions which tend to show that he has previously committed some criminal offence. It is not relevant because the fact that he has committed an offence on one occasion does not in any way show that he is likely to commit an offence on any subsequent occasion. Accordingly, such questions are, in general, inadmissible, not primarily for the reason that they are prejudicial, but because they are irrelevant. There is, however, this difference in the application of the principle. In the case of the prosecution, a question of this sort may be relevant and at the same time be prejudicial, and, if the court is of the opinion that the prejudicial effect outweighs its relevance, then it has the power, and, indeed, the duty, to exclude the question. Therefore, counsel for the prosecution rarely asks such a question. No such limitation applies to a question asked by counsel for the defence. His duty is to adduce any evidence which is relevant to his own case and assists his client, whether or not it prejudices anyone else.

Accordingly, the question which I have to ask myself in the first instance is whether it was relevant to inquire where Harris was at a certain period of time. The answer is, I think, that it was relevant, and, indeed, no real objection has been taken on that ground. It was plainly relevant to the case which was being developed on behalf of the accused Mercado—that the time when the conspiracy was, as he says, quiescent was a time when Harris was unable to take part in it. So far no real evidence has been adduced, but the question indicates what I presume will be the case, that counsel for Mercado will seek to tender proof of where Harris was at the relevant period, and what I am doing, in effect, is determining whether evidence of that character is admissible or not. For the reasons that I have given I think it is relevant, and, therefore, admissible.

Although there was no irregularity in the form of the question under consideration, I have dealt with it in this way to make clear how far my ruling goes. First, it does not open the field to any question of this kind by counsel for an accused person against the character of another accused. It is admissible in the present case because it happens to be relevant. In the ordinary way the character of the accused is no more relevant at the hands of the defence than it is at the hands of the prosecution. Secondly, while counsel for the defence is not bound by the same considerations of restraint that would affect counsel for the prosecution in such a matter, care ought to be taken not to go any further than is strictly necessary for the proof of the relevant point on which the defence desires to rely. In such a matter the court is very much in the hands of counsel. I have indicated that at this stage proof of where Harris was at a given period during the conspiracy appears to me to have relevance, but I think that counsel for the defence ought to follow, so far as possible in the very different circumstances of appearing for the defence, the same restraint as counsel for the prosecution would, and ought not to introduce material of this sort further than is necessary or unless it is strictly required for the purpose of his case. Thirdly, I think that any question of this sort that is being asked by counsel for one accused that will affect the other accused ought to be communicated to counsel for the other accused in advance, so that he may consider whether he desires to take any objection to it.

The cases on which counsel for Harris relied do not, in my judgment, assist him. They were cases in which there was an irregularity in the conduct of the case by the prosecution. The evidence of previous character was irrelevant and inadmissible, but it had slipped out in some way, sometimes through the fault

of the witness, sometimes through the fault of counsel, and, therefore, it made the conduct of the prosecution's case irregular. Where such an irregularity exists a new trial will generally be granted and the jury will be discharged. Here there is no irregularity, and if I were simply to discharge the jury and start the trial all over again the same results would necessarily follow, since the question that has been put could be put again. Therefore, the essence of the application is not the discharging of the jury on the ground of irregularity, but an application for a separate trial. The considerations which I apply to that are just the same as if counsel for Harris, having been forewarned of the nature of the defence which was to be advanced on behalf of Mercado, had made the application at the beginning of the case.

On such an application one of the matters taken into consideration is the possibility that one co-defendant may raise a defence which reflects on another co-defendant and involves an attack on his character, and for this purpose I will treat the question that is being asked as having the same effect as if it were an attack on Harris's character, though it is primarily made, not for that purpose, but to prove where he was at a given moment. I do not draw any distinction on that ground. The recent cases in which this matter has been considered—I have in mind in particular *Rez v. Grondkowski*, *Rez v. Malinowski* (1)—show that that possibility is only one of the elements that has to be taken into consideration in determining whether there should or should not be a new trial. In each case one has to consider what the interests of justice require, and, as LORD GODDARD, C.J., pointed out in *Rez v. Grondkowski*, *Rez v. Malinowski* (1), the interests of justice are not necessarily the same as the interests of the accused.

The fundamental thing, to my mind, about the present case is that it concerns a charge of conspiracy, that it alleges—and there is *prima facie* evidence to support the allegation—that Mercado and Harris were engaged in a common enterprise and were fellow conspirators. The cases must be rare in which fellow conspirators can properly in the interests of justice be granted a separate trial. The fact that, as is plain, one accused person desires to throw blame on the other, that Mercado desires to suggest that Harris was, in effect, using the facilities which were provided by his office, unbeknown to him (Mercado), to conduct an illegal enterprise and that Mercado was innocent, suggests the difficulty which could arise if separate trials were granted. Take the case of two prisoners, A. and B., who are said to have been engaged in a common illegal enterprise, and one desires to say that he was made use of by the other, that he was innocent and was misled. If a separate trial be granted, the result would be that in the first case the prisoner A. might go into the witness-box and give evidence of all sorts of things said by B. and of the conduct of B. which would pass necessarily without any denial, and might represent B. as being a man of obvious criminality, and the result would be that the jury, hearing only A.'s side and not B.'s, might think it proper to acquit A. Then the trial of B. takes place before another jury and the same procedure happens in reverse, and the jury in that case might think it proper to acquit B. The result of granting a separate trial might, therefore, be that there was a miscarriage of justice. And the same result would, I think, apply if one assumes, contrary to the assumption that I have made, that one of the accused is innocent. The result might be that the jury in such a case, hearing only the innocent accused and not having had the advantage of seeing the other accused, not being able to form any opinion about his character, not hearing him cross-examined, might come to the conclusion that there was not enough in the story that they had heard, in the

(1) 110 J.P. 193; [1946] 1 All E.R. 559, 561, [1946] K.B. 369, 372.

absence of hearing the other side and of it being tested, to justify an acquittal.

The principle is that in cases of this sort justice ordinarily requires that the whole matter should be tried as one case, and that it will need a very strong and exceptional case before it is split up into two separate trials. If separate trials were to be ordered as a matter of course simply because one accused proposed to attack the character of another, then a separate trial, and the possible advantages in the case of a guilty accused, could always be obtained simply by the threat that one accused proposed to attack the character of his fellow accused. I have, therefore, given the main weight to that consideration, though I have had regard also to the desirability, where it is possible, of excluding these matters from mention in front of the jury. On balance I think that I should not have granted a separate trial if an application had been made at the beginning of the case. I think the same principles apply now, and I do not grant a separate trial, which would be the result of the application that was made to me if it was successful. Accordingly, the application fails and the trial will proceed with the accused as at present arraigned. *Application refused.*

Solicitors: *M. G. Whitton, Solicitor for the Customs and Excise (for the Crown); Canter, Hellyar & Co. (for Miller and Harris); Bieber (A.) & Bieber (for Mercado).* T.R.F.B.

COURT OF CRIMINAL APPEAL

(SLADE, DEVLIN AND GORMAN, JJ.)

August 19, 20, 1952

REG. v. STRAFFEN

Criminal Law—Evidence—Evidence of other criminal acts—Confession of previous offences in similar circumstances.

Criminal Law—Evidence—Answers to questions by police—Caution—"Person in custody"—Broadmoor patient—"Judges' Rules", r. 3.

The appellant, who was a Broadmoor patient, was charged with the murder of a young girl, the case for the prosecution being that he had murdered her by strangulation during a period in which he had escaped from the institution. After his recapture he was interviewed at the institution by police officers, who, without administering a caution, questioned him on his movements during his escape. Evidence at the trial was admitted of these questions and the appellant's answers, and also of a confession by the appellant that he had previously strangled two other young girls in very similar circumstances.

HELD: (i) when the appellant was interviewed by the police officers he was not a person "in custody" within the meaning of r. 3 of the "Judges' Rules", as the custody therein referred to was limited to the custody of the police, and, therefore, the questions and answers put to the appellant were properly admitted:

(ii) evidence of the previous murders was admissible as tending to identify the person who had committed the murder charged in the indictment with the person who had committed the two previous murders, and was, therefore, rightly admitted.

Makin v. A.-G. for New South Wales (58 J.P. 148; [1894] A.C. 57) and *Thompson v. Regem* (82 J.P. 145; [1918] A.C. 221), applied.

APPEAL against conviction.

The appellant was convicted at Hampshire Assizes before CASSELS, J., of the murder of a girl aged five years, and was sentenced to death. He appealed on the ground that the judge had wrongly admitted (i) evidence of questions put to the appellant by the police and the appellant's answers thereto while the

appellant was in custody in Broadmoor institution, without a caution having been previously administered, and (ii) evidence of a confession by the appellant of two previous murders of young girls in very similar circumstances.

Elam and H. E. Park for the appellant.

The Solicitor-General (Sir Reginald Manningham-Buller, Q.C.), G. D. Roberts, Q.C., and J. N. Hutchinson for the Crown.

SLADE, J., delivered the following judgment of the court. This is an appeal from the conviction of John Thomas Straffen before **CASSELS, J.**, and a jury at the Winchester Assizes of the murder of Linda Bowyer, a girl of five and three-quarters years of age, on Apr. 29, 1952. Two grounds are raised in support of the appeal. The first ground is:

"That the learned judge was wrong in law in admitting evidence at the trial of murders alleged to have been committed by the accused at Bath on July 15 and Aug. 8, 1951, respectively."

That refers to the murders of two other young girls, namely, Brenda Goddard and Cicely Batstone. The second ground is:

"That the learned judge was wrong in law in admitting evidence at the trial of the oral statements made by the accused to Detective-inspector Francis and Detective-sergeant Lawson on Apr. 30, 1952, while he (the accused) was in custody and without the usual caution being first administered."

The second ground of appeal is based on what are known as the Judges' Rules. These rules are designed to secure that no advantage be taken of a prisoner who is in custody by requiring that in such a case the police shall administer the usual caution to him before questioning him. Those rules have no force in law in the sense that answers given by an accused person to any inquiries made in breach of them are inadmissible. It is a matter for the discretion of the learned judge in each case whether, when inquiries are made in contravention of the rules, the answers should be admitted or not. In the present case **CASSELS, J.**, took the view that the words "in custody" in the rules meant "in custody of the police" and did not apply to a patient at Broadmoor, and he added that, if they did, it would never be possible to make any inquiries of a patient at Broadmoor without first administering the caution. In the opinion of the court the learned judge was right in exercising the discretion that he did in admitting the evidence of Detective-inspector Francis and Detective-sergeant Lawson, and there is no substance in that ground of appeal.

The other ground of appeal raises a far more serious point, but one on which the members of this court have reached a clear conclusion. On Apr. 29, 1952, the appellant escaped from Broadmoor and was at large from 2.40 to 6.40 p.m. on that day. At about 6 a.m. on Apr. 30 the dead body of Linda Bowyer was found in the village of Little Farley and her bicycle was found some two hundred yards away from the body. She had died from manual strangulation, and the medical evidence showed that her death had taken place some twelve to fifteen hours previously, which would come within the period during which the appellant was at large. Miss Saxby, who was called as a witness for the prosecution, was the last person to see Linda Bowyer alive. She said that she had seen her shortly after 5.30 p.m. The appellant's movements were more or less accounted for except for a period between 5.30 and 6 p.m., and having regard to the distances involved there is no doubt that that time provided him with ample opportunity to commit the crime had he been so minded.

About two and a half hours after the discovery of the dead body of Linda Bowyer Detective-inspector Francis and Detective-sergeant Lawson went to the Broadmoor institution, to which the appellant had been taken on his recapture the previous evening. Accompanied by some male nurses they went into the appellant's room, told him that they were police officers, and said that they would like to talk to him about his escape the previous day. Inspector Francis said:

"Are you prepared to tell us what you did and where you went?"

The appellant gave an account of some of his movements, and then Inspector Francis said:

"Yes, we know all that, but we should like to know what else you did, and if you got into any mischief?"

The appellant then said: "I did not kill her." Evidence was called by the prosecution to prove that at no time between 6.40 p.m. on Apr. 29 and the time of this interview—about 8.30 a.m. on Apr. 30—was there any opportunity of the appellant having access to newspapers or any other source of information relating to a little girl having been killed.

When the appellant said: "I did not kill her", Inspector Francis said: "What do you mean by you did not kill her? There has been no suggestion that anyone has been killed, injured, or in any way attacked". The appellant: "I know what you policemen are. I know I killed two little children, but I did not kill the little girl". Inspector Francis: "What do you know of the little girl being killed?" The appellant: "I did not kill her". Detective-sergeant Lawson: "A little girl was in fact killed quite close to where you were arrested". The appellant: "I did not kill the little girl with the bicycle". At the time not only had nothing been said about a little girl having been killed, except when it had been mentioned by Sergeant Lawson a moment or two before, but nothing had been said about a little girl with a bicycle.

After that conversation the appellant made a voluntary statement as to his movements during the time when he was at large. It was taken down, read over to him in the usual way, and signed by him. That written statement confirmed the evidence which was given by witnesses for the prosecution including, in particular, that of the step-father of Linda Bowyer, a Mr. Sims. In that statement there appeared this passage:

"I saw about four little girls talking in the road not far from the pub. One of the little girls ran into her house crying, the other two went towards the pub. The other one went back to her house and when I looked back she had a bike and was riding up behind me. I heard a man, I think he was from the shop, ask her if her mother was home. I think she said: 'Yes'. The man then got into a van which was parked outside the shop. I then walked straight along the road. I turned round again. The girl was not there at all."

The man referred to is clearly Mr. Sims, the step-father, who said in evidence that he had had such a conversation with his step-daughter at that place. At the end of the statement the appellant said:

"I have been shown a photograph by the police officer of a little girl and that is a photo of the little girl who I saw with the bike near the pub and who followed me up the road."

The photograph so shown to the appellant and identified by him as the fourth of the four little girls to whom I have just referred was a photograph of the deceased girl, Linda Bowyer.

The defence of the appellant was that he did not kill Linda Bowyer. He pleaded Not Guilty, and it was for the prosecution to prove their case. To do that the prosecution were entitled to call any evidence which was admissible in law. At an early stage, in the absence of the jury, they sought the judge's permission to admit evidence of the deaths of Brenda Goddard and Cicely Batstone, and they came prepared with evidence which amounted to a confession by the appellant that he murdered those two little girls. Indeed, one of the answers made by the appellant to the police officers in the case of Linda Bowyer was: "I know I killed two little children, but I did not kill the little girl". Unquestionably the two little children to whom he was there referring were Brenda Goddard and Cicely Batstone. The learned judge, after hearing legal argument, admitted the evidence. The question here is whether that evidence was properly admitted. The ground on which it was admitted was that it was material to establish the identity of the murderer of Linda Bowyer.

The general rule is that evidence should be excluded which tends to show that the accused has been guilty of criminal acts other than those covered by the indictment, and it is an irrefragable rule that evidence of the commission of criminal offences not covered by the indictment shall not be admitted for the purpose of proving that the accused is a person of criminal disposition, or even that he has a propensity for committing the particular type of crime with which he is charged. But, apart from statute, there are certain recognised exceptions to the general rule under which evidence is admissible of other crimes committed by the accused, the reason for its admission being that it tends to prove, not that he is a man who has criminal propensities, but that he was the man who committed the particular offence charged.

I take the law on the point from *Makin v. A.-G. for New South Wales* (1). In that case LORD HERSCHELL, L.C., delivering the judgment of the Privy Council, said ([1894] A.C. 65):

"It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."

Here the evidence was admitted by the learned judge on the latter ground, namely, that it tended to rebut a defence which was otherwise open to the accused, that is, that he was not the person who committed the murder.

In dealing with *Makin's* case (1) recently in the House of Lords in *Harris v. Director of Public Prosecutions* (2), VISCOUNT SIMON said:

"In my opinion, the principle laid down by LORD HERSCHELL, L.C., in *Makin's* case (1) remains the proper principle to apply, and I see no reason for modifying it . . . It is, I think, an error to attempt to draw up a closed list of the sort of cases in which the principle operates. Such a list only provides instances of its general application, whereas what really matters is the principle itself and its proper application to the particular circumstances

(1) 58 J.P. 148; [1894] A.C. 57.

(2) 116 J.P. 248; [1952] 1 All E.R. 1044.

of the charge that is being tried. It is the application that may sometimes be difficult, and the particular case now before the House illustrates that difficulty."

Further on Viscount SIMON said:

"The substance of the matter appears to me to be that the prosecution may adduce all proper evidence which tends to prove the charge."

After dealing with *Thompson v. Regem* (1), he said:

"It is the fact that [the accused] was involved in the other occurrences which may negative the inference of accident or establish his mens rea by showing 'system', or, again, the other occurrences may sometimes assist to prove his identity, as, for instance, in *Perkins v. Jeffery* (2). But evidence of other occurrences which merely tend to deepen suspicion does not go to prove guilt."

That being the law, the question is whether the evidence in the present case falls within the category of admissibility as being relevant to prove the crime charged by showing that it was the appellant who committed it. The grounds on which the admissibility of the evidence was urged by the Solicitor-General in the court below was the similarity of the deaths and of the circumstances surrounding them in the case of the two murders at Bath, on the one hand, with the circumstances of the murder at Little Farley, on the other. He stated the similarities to be, first, that each of the victims was a young girl; secondly, that each of the young girls was killed by manual strangulation; thirdly, that in each case there was no attempt at sexual interference or any apparent motive for the crime; fourthly, that in none of the three cases was there any evidence of a struggle; and, fifthly, that in none of the three cases was any attempt made to conceal the body although the body could have been easily concealed. Those similarities were fortified by the medical evidence given by Dr. Gibson, dealing with the murders of Brenda Goddard and Cicely Batstone, and the pathologist, Dr. Teare, dealing with the murder of Linda Bowyer. Referring to the two earlier murders, Dr. Gibson said:

"The cause of death was asphyxia due to manual strangulation. Q.—Was there any sexual interference with this little girl [Brenda Goddard] ? A.—None at all. Q.—Apart from the abrasions to her throat, and the laceration on the back of her head, had she sustained any other injuries ? A.—Not apart from one or two minor scratches, which might have been caused earlier; there were no other injuries. Q.—On Aug. 9 did you go to the field known as The Tumps in Bloomfield Road, Bath ? A.—I did. Q.—Did you go along the hedge in that field which is shown in photograph No. 2 of Exhibit 15 ? A.—Yes. Q.—Did you see a body lying underneath the hedge, as shown in photograph No. 3 ? A.—Yes. Q.—Did you carry out an examination of the body of that child ? A.—I did. Q.—What was the cause of death ? A.—Asphyxia, due to manual strangulation. Q.—Had there been any sexual interference with that child ? A.—None at all. Q.—I think you were present when a post mortem examination was made of her body ? A.—I was. Q.—Were there any injuries to her body, apart from the region of the throat ? A.—No. Q.—Comparing the two cases of Brenda Goddard and Cicely Batstone, so far as you could see from an examination of their bodies, had their death been caused in exactly the same fashion, by manual strangulation ? A.—Yes. Q.—The

(1) 82 J.P. 145; [1918] A.C. 221.

(2) 79 J.P. 425; [1915] 2 K.B. 702.

only difference between them being that one had a laceration on the back of the head and the other had not? A.—That is so. Q.—Which, in your view, did not contribute to her death? A.—It did not."

That laceration, according to the appellant, was caused by his banging her head against a stone because the child, apparently, uttered no cry when he was strangling her.

"Q.—In neither case was there any sexual interference? A.—No. Q.—In the case of Brenda Goddard, she was lying along by a wall in a wood? A.—Yes. Q.—So far as you could see, had any attempt been made to conceal her body? A.—None at all. Q.—In the case of Cicely Batstone, her body was lying by a high hedge, was it not? A.—Yes, close to a high hedge. Q.—So far as you could see, had any attempt been made to conceal her body? A.—I did not think so."

Dealing with the evidence as regards Linda Bowyer Dr. Teare said:

"I saw the body of Linda Bowyer. Q.—Have you studied the depositions, the photographs, and the post mortem reports in the cases of Brenda Goddard and Cicely Batstone? A.—I have. Q.—And did you hear the evidence of Dr. Gibson? A.—I did. Q.—In the case of Linda Bowyer did you find many similarities with regard to her death when compared with the deaths of Cicely Batstone and Brenda Goddard? A.—I did. Q.—First of all, of course they were all little girls? A.—Yes. Q.—They all died of manual strangulation? A.—Yes. Q.—In the case of Linda Bowyer also there was no attempt at sexual interference? A.—That is so. Q.—In the case of Linda Bowyer also there was no apparent motive, was there? A.—No. Q.—So far as Linda Bowyer was concerned, you went to the spot where her body was found? A.—I did. Q.—Was there any evidence of any struggle in that case? A.—I could see none. Q.—And no attempt in that case to conceal the body? A.—None at all. Q.—Would concealment have been fairly easy in that case? A.—It would. Q.—With regard to the case of Linda Bowyer, the case where you did see the body, was there any feature about her death which impressed itself upon your mind? A.—Yes, at the time I was struck by the precision with which this child's death appeared to have been caused. It struck me that the pressure on her neck was determined and applied at exactly the right points, as if by a person with some experience of this method of killing. Q.—The injuries which she sustained were very local in character, were they not? A.—They were. Q.—Do you attach any significance to that? A.—They [the injuries] were in contrast to the exaggerated amount of bruising and external injury which one commonly sees in cases of strangulation, even in young children. Q.—From the knowledge you now possess of the death of Cicely Batstone, was the same feature apparent there? A.—Yes, but less marked than in the case of Linda Bowyer."

The evidence with regard to the deaths of Brenda Goddard and Cicely Batstone was admitted to show that the person who manually strangled those two little girls also manually strangled Linda Bowyer in similar circumstances. In the opinion of the court, that evidence was rightly admitted, not to show, to use the words of counsel for the appellant, that the appellant was a professional strangler, but to show that he strangled Linda Bowyer—in other words, to identify the murderer of Linda Bowyer as being the same person as the person who had murdered the other two little girls in precisely the same way. I see no distinction

in principle between this case and *Thompson v. Regem* (1) and, indeed, I think one cannot distinguish abnormal propensities from identification. Abnormal propensity is a means of identification. In *Thompson's* case (1) the offence charged was committed on Mar. 16, 1917, and the evidence was that on that day an appointment was made by the man who committed the offences with the boys to meet those boys again on Mar. 19. It was common ground that it was the accused who went to the appointed place on Mar. 19, and he found the police waiting for him. When he was arrested there were found on him powder puffs, and at his lodgings there were found indecent photographs of boys. Evidence was admitted of the powder puffs and of the photographs that were found on the 19th to prove that the accused committed the offence on the 16th, the boys having identified him as being the person who committed that offence and he having set up an alibi. It was admitted to prove his identity by showing that he was one of those persons who suffer from the abnormal propensity of homosexuality. In the present case it is an abnormal propensity to strangle young girls without any apparent motive, without any attempt at sexual interference, and to leave their dead bodies where they can be seen and where presumably their deaths would be rapidly detected. In the judgment of the court, this evidence was admissible because it tended to identify the person who had murdered Linda Bowyer with the person who had confessed in his statements to having murdered in similar circumstances a year before Brenda Goddard and Cicely Batstone.

Counsel for the appellant asked: How far, then, does the admissibility of such evidence go? Does it apply in the case of a burglar, housebreaker, thief, and so on? LORD SUMNER, in *Thompson's* case (1), pointed out that such persons were merely examples of those who fell within the genus of dishonest persons, but, speaking for myself, if the question of identity arose in a case of housebreaking and it were possible to adduce evidence that there was some peculiarity in relation to earlier housebreakings which was apparent also in the case of the housebreaking charged so as to stamp the accused man not only with the housebreaking charged but with the earlier housebreakings, and there was a confession or other evidence that he had committed the earlier housebreakings, that evidence would fall within the same principle of admissibility, not to prove his propensity for housebreaking, but to prove that he was the person who committed the housebreaking charged. Counsel for the appellant has conceded that, if the evidence was admissible, the discretion of the learned judge to admit it at the trial and not to reject it on the ground that its prejudicial effect was disproportionate to its probative value was judicially exercised, and, therefore, this appeal is dismissed.

Appeal dismissed.

Registrar, Court of Criminal Appeal (for the appellant); Director of Public Prosecutions (for the Crown).

T.R.F.B.

(1) 82 J.P. 145; [1918] A.C. 221.

COURT OF APPEAL

(SOMERVELL, JENKINS AND HODSON, L.JJ.)

October 3, 6, 1952

MIDDLESEX COUNTY COUNCIL v. MINISTER OF LOCAL GOVERNMENT
AND PLANNING AND ANOTHER

Compulsory Purchase—Land the property of local authority—Special Parliamentary procedure—Material date of ownership by local authority—Acquisition of Land (Authorisation Procedure) Act, 1946 (9 and 10 Geo. 6, c. 49), sched. I, Part III, para. 9.

On Jan. 21, 1949, a borough council made an order for the compulsory purchase of 123 acres of land for use as a cemetery. On Feb. 22, 1949, within the time specified for objections, objection to the order was made by the county council within whose area the land in question was. The borough council submitted the order to the Minister of Health for confirmation in accordance with the provisions of s. 1 (1) of, and sched. I, para. 1, to, the Acquisition of Land (Authorisation Procedure) Act, 1946, and the Minister, in view of the objection, ordered an inquiry to be held. On Nov. 7, 1949, two days before the inquiry began, the county council purchased by agreement with the owner the land comprised in the order. On Apr. 18, 1950, the Minister confirmed the order. On an application by the county council to quash the order, on the ground that, as the order authorised the purchase of land which was the property of a local authority, under para. 9 of sched. I to the Act it was subject to special Parliamentary procedure,

Held: for a case to fall within para. 9 the land must be the property of the local authority (per SOMERVELL, L.J.) at the time when that authority made an objection to the order under para. 3 (1) of the schedule, or (per JENKINS, L.J.) on the day immediately following the expiration of the period within which objections must be made. On neither of those dates were the county council the owners of the land, and, therefore, the order by the borough council was not subject to special Parliamentary procedure and the Minister had jurisdiction to confirm it.

Marriott v. Minister of Health (1936) (100 J.P. 432), distinguished.

Decision of ORMEROD, J. ([1951] 2 All E.R. 732), reversed.

APPEALS by the Minister of Local Government and Planning and the Islington Borough Council from an order of ORMEROD, J., dated July 27, 1951, and reported [1951] 2 All E.R. 732, quashing a compulsory purchase order made by the borough council under the London Government Act, 1939, s. 100, and confirmed by the Minister of Health* under the Acquisition of Land (Authorisation Procedure) Act, 1946, s. 1 (1) and sched. I.

On Jan. 21, 1949, the borough council made the Metropolitan Borough of Islington (Land at Trent Park) Compulsory Purchase Order, 1949, relating to 123 acres of Trent Park, situated in the administrative county of Middlesex. On Feb. 22, 1949, three days before the time for objections to the order of the borough council expired, the county council lodged an objection. On May 23, 1949, and July 6, 1949, orders were made by the county council for the compulsory purchase of the whole of the land comprising Trent Park, including the 123 acres included in the borough council's order, and to those orders the borough council lodged objections. On Nov. 7, 1949, the county council entered

* By art. 3 (1) and Part I of the schedule to the Transfer of Functions (Minister of Health and Minister of Local Government and Planning) (No. 1) Order, 1951 (S.L., 1951, No. 142), which came into operation on Jan. 30, 1951, the functions of the Minister of Health under the London Government Act, 1939, s. 100, were transferred to the Minister of Local Government and Planning. By art. 1 (1) of the Minister of Local Government and Planning (Change of Style and Title) Order, 1951 (S.L., 1951, No. 1900), which came into operation on Nov. 3, 1951, the style and title of the Minister of Local Government and Planning was changed to Minister of Housing and Local Government.

into an agreement under seal with the owner of Trent Park to purchase the entire property. On Nov. 9, 1949, a public local inquiry was held into the objections to all the orders, and on Apr. 18, 1950, the Minister confirmed the order made by the borough council.

The county council contended that as they, a local authority, had made objection to this order (which objection had not been withdrawn) and had become the owners of the property in question before the date of the Minister's inquiry, the order was subject to special Parliamentary procedure under s. 1 (2) of, and sched. I, Part III, para. 9, to, the Act of 1946. The Minister and the borough council contended that the relevant date for the purposes of para. 9 was the date of the order, and that, as at that date the county council were not the owners of the land affected by the order, the order was not subject to special procedure. They also contended that the county council had not made objections as owners of the land, and, therefore, the provisions of para. 9 did not apply. ORMEROD, J., held that regard must be had to the position which existed at the date of the inquiry and not to that which existed at the date of the making of the order by the borough council; at the date of the inquiry the county council were the owners of the property within sched. I, Part III, para. 9, to the Act of 1946; and, therefore, the order was subject to special Parliamentary procedure under the paragraph and must be quashed.

Sir Lynn Ungood-Thomas, Q.C., and *J. P. Ashworth* for the Minister of Local Government and Planning.

Roue, Q.C., *Squibb* and *W. J. Glover* for the borough council.

H. B. Williams, Q.C., and *J. R. Willis* for the county council.

SOMERVELL, L.J.: This is an appeal from a decision of ORMEROD, J., which raises a point of construction under the Acquisition of Land (Authorisation Procedure) Act, 1946. [HIS LORDSHIP stated the facts and continued:] Section 1 of the Act provides:

"(1) The authorisation of any compulsory purchase of land—(a) by a local authority . . . shall, subject to the provisions of this and the next following section, be conferred by an order . . . in accordance with the provisions of sched. I to this Act . . . (2) The purchase, in a case falling within the last foregoing sub-section, of land—(a) which is the property of a local authority . . . shall be subject to the special provisions of Part III of the said sched. I."

Section 2 deals with the power of speedy acquisition.

The point is one of construction of para. 9 of sched. I, but it is right that I should refer to the earlier paragraphs, partly because they indicate the general nature of the procedure, and, also, because they were, to some extent, relied on by counsel on both sides. Paragraph 1 of Part I provides:

"A compulsory purchase order authorising a compulsory purchase by a local authority . . . in a case falling within sub-s. (1) of s. 1 of this Act shall be made by the local authority and submitted to and confirmed by the authority having power under the enactment in question to authorise the purchase (hereafter in this schedule referred to as the 'confirming authority') in accordance with the following provisions . . ."

Paragraph 3 (1) (a) provides for publication in local newspapers of a notice stating that an order has been made and specifying the time, not being less than twenty-one days from the first publication of the notice, within which and the manner in which objections to the order can be made. Paragraph

3 (1) (b) provides that unless a special direction is given, notice is to be served on every owner, lessee and occupier (except tenants for a month or any period less than a month) of land comprised in the order. Those notices also have to specify the time for objection which must be not less than twenty-one days from the service. Paragraph 4 was discussed in argument and there may be difficult points of construction, some of which are not, in my view, necessary for decision so far as this case is concerned. Paragraph 4 (1) provides:

"If no objection is duly made by any such owner, lessee or occupier as aforesaid or if all objections so made are withdrawn, the confirming authority, upon being satisfied that the proper notices have been published and served, may, if the authority thinks fit, confirm the order with or without modifications."

It seems to me reasonably plain that that sub-section is dealing only with objections by owners, lessees or occupiers, and it is sufficient for the construction of para. 9 to note in passing that under these earlier paragraphs objections by owners, lessees or occupiers are specially dealt with and for certain purposes come into a category of their own.

In my view, this appeal turns on the special provisions of Part III relating to land of the descriptions specified in s. 1 (2) of the Act. Paragraph 9 provides:

"A compulsory purchase order shall, in so far as it authorises the compulsory purchase of land which is the property of a local authority . . . be subject to special Parliamentary procedure in any case where an objection to the order has been duly made by the local authority . . . and has not been withdrawn."

The Middlesex County Council objected to the order made by the borough council, but they were not at that time the owners. Their objection, therefore, was not an objection as owners. They only became owners on Nov. 7, 1949, some months after the time for submitting objections had expired. In my view, the words "duly made" in para. 9 mean, among other things, made within the time specified in the notice. In the present case the learned judge has held that Middlesex County Council, although they objected at a time when they were not owners, had fulfilled the conditions of para. 9, and were entitled to say that an objection to the order had been duly made by the local authority within the meaning of that paragraph. In my opinion, the proper construction of the paragraph is that the objection to the order which is to be duly made must be made by the local authority as owner of the land which it is sought to purchase. As no such objection was ever made by the Middlesex County Council within the time limited, I do not think that the special Parliamentary procedure became applicable to this order.

That, perhaps, would be sufficient to dispose of the case, but I would like to add one or two other observations. Counsel rightly submitted for the Middlesex County Council that this was a matter of jurisdiction. I agree. The only question is in what circumstances the Minister has jurisdiction to confirm without the order being subject to special Parliamentary procedure. I do not think there is anything surprising in the result for which the respondents contend. It might well be that a distinction is logically drawn between the case in which a local authority is the owner at the time when the original order is made, or, possibly, becomes the owner before the time for objection expires, and the case in which it becomes the owner at a later date. That is a distinction which, I think, is drawn by para. 9. A further question, which does not arise in this case, is whether the special procedure applies only when the local authority

is the owner at the time of the original order or whether it applies if the authority becomes owner at any date before the period for objection has expired. I propose to leave that point open in case it arises and it is desired to argue it on some future occasion.

In *Marriott v. Minister of Health* (1) a compulsory purchase order was made under the Housing Act, 1930, at a time when there were on the area dwelling-houses which had been condemned as unfit for human habitation and which the owners had been required to clear, but had not at that time cleared. By the time the public inquiry was held the buildings had been demolished and that was made known to the inspector. This court, affirming the judgment of SWIFT, J., held that, having regard to the provisions of the Act of 1930, the condition of affairs at the date of the public inquiry was not only relevant, but must be taken into account by the Minister, and, as at the date of the inquiry there was no subject-matter on which the Act could operate, the order ought not to have been confirmed. That decision, based on different words in a different Act which deals with a different subject-matter, does not assist us in the present case, and certainly cannot affect the construction which, if I am right, is the correct construction of para. 9 of sched. I to the Act of 1946. For the reasons which I have given, I would allow the appeal.

JENKINS, L.J.: I agree. Section 1 (1) of the Act of 1946 provides that the authorisation of any compulsory purchase of land by a local authority shall, subject to the provisions of that section and s. 2, be conferred by a compulsory purchase order in accordance with the provisions of sched. I to the Act. Section 1 (2) provides:

"The purchase, in a case falling within the last foregoing sub-section, of land—(a) which is the property of a local authority or which has been acquired by statutory undertakers for the purposes of their undertaking, (b) forming part of a common, open space or fuel or field garden allotment, or held inalienably by the National Trust, or (c) being, or being the site of, an ancient monument or other object of archaeological interest, shall be subject to the special provisions of Part III of the said sched. I."

It will be observed that there are other descriptions of property besides property of a local authority which under s. 1 (2) are, in regard to their compulsory purchase, subject to the special provisions of Part III of sched. I to the Act. Turning to sched. I, one finds that by Part I, para. 1:

"A compulsory purchase order authorising a compulsory purchase by a local authority (hereafter in this schedule referred to as the 'acquiring authority') in a case falling within sub-s. (1) of s. 1 of this Act shall be made by the local authority and submitted to and confirmed by the [Minister of Health] in accordance with the following provisions of this schedule."

In para. 3 there are provisions as to notices, specifying the time within which and the manner in which objections to the order can be made. I will not repeat what has been already said about the remaining provisions of Part I of the schedule as I do not think they give much assistance one way or the other on the present question, but I will go straight to Part III, on the construction of which the case really turns. Land which belongs to a local authority, or

(1) 100 J.P. 432; [1936] 2 All E.R. 865; [1937] 1 K.B. 128.

has been acquired by statutory undertakers for the purposes of their undertaking, or which is held by the National Trust inalienably, is dealt with in para. 9 of Part III. The special provisions regarding other descriptions of land mentioned in s. 1 (2) of the Act are not directly material, but it is worth while observing how the case of land forming part of a common, open space, or fuel or field garden allotment, and the case of land being, or being the site of, an ancient monument or other object of archaeological interest, are treated in Part III. A common, open space, or fuel or field garden allotment is dealt with in para. 11 (1), which provides that:

"In so far as a compulsory purchase order authorises the purchase of any land forming part of a common, open space or fuel or field garden allotment, the order shall be subject to special Parliamentary procedure unless the Minister of Agriculture and Fisheries (in the case of a common or of a fuel or field garden allotment) or the Minister of Town and Country Planning (in the case of an open space not being a common or such an allotment) is satisfied [on certain matters] and certifies accordingly."

So, in that case special Parliamentary procedure must apply wherever land of one of the relevant descriptions is concerned unless the appropriate Minister certifies his satisfaction as to the matters mentioned. Paragraph 12 deals with the case of land being, or being the site of, an ancient monument or other object of archaeological interest. It provides that compulsory purchase orders with regard to land of that description

"... shall be subject to special Parliamentary procedure unless the Minister of Works certifies that the acquiring authority has entered into an undertaking with the Minister to observe such conditions as to the use of the land as in his opinion are requisite having regard to the nature thereof."

Thus, in those two cases there are plain provisions to the effect that whenever a compulsory purchase order authorises the purchase of land of one of the descriptions mentioned, the special Parliamentary procedure must be observed unless the Minister concerned gives his certificate dispensing with that necessity.

The provisions relating to land which is the property of a local authority are entirely different, and the difference is, perhaps, instructive. It will be seen that there is nothing in para. 9 comparable to the provisions in paras. 11 and 12. Paragraph 9 does not say that, so far as land belonging to a local authority is concerned, the compulsory purchase order shall be subject to Parliamentary procedure unless the local authority consents to the purchase or anything of that kind. The ownership of land by a local authority only necessitates special Parliamentary procedure if the conditions set out in para. 9 are observed. On the true construction of the paragraph what are those conditions? It begins by referring to the compulsory purchase order. It says that such order, in so far as it authorises the compulsory purchase of land of the relevant description, shall be subject to special Parliamentary procedure in certain cases. Going back to para. 1 of the schedule, one observes that a compulsory purchase order authorising a compulsory purchase by a local authority shall be made by the local authority and submitted to and confirmed by (in this case) the Minister of Health. Bearing that in mind, it seems to me that the reference at the beginning of para. 9 to a compulsory purchase order, in so far as it authorises a compulsory purchase of land and so on, is a reference to the order as made by the acquiring local authority. It clearly cannot be a reference to the order as confirmed by the Minister, for, *ex hypothesi*, where special

Parliamentary procedure is necessary there can be no question of confirmation by the Minister. In such a case the special Parliamentary procedure has to be carried out and appropriate provisions are contained in the Statutory Orders (Special Procedure) Act, 1945, as to the method of bringing the order into operation after that special procedure has been complied with.

Attention is thus directed to the point of time at which the local authority has made an order authorising the compulsory purchase of land. At that point of time the order, in a case where no property of any of the special descriptions mentioned in sub-s. (2) of s. 1 is in question, is subject to confirmation by the Minister in accordance with the ordinary procedure. Paragraph 9 is dealing at the same point of time with cases where something else may be required, namely, the special Parliamentary procedure. The order is to be subject to that procedure if two conditions are fulfilled and not otherwise. The first condition, so far as material to the immediate case, is that the land should be the property of a local authority. The second condition is that objection to the order shall have been duly made by the local authority and not withdrawn. It seems to me that (subject to the possibility of subsequent withdrawal of any objection duly made) the language of para. 9 makes it reasonably clear that the latest date for considering the matter, and seeing whether those two essential conditions exist, and, accordingly, whether the special Parliamentary procedure is required or not, is the date immediately following the expiration of the period within which objections, if any, must be made. Considering the situation as at that date, the Minister (in effect) has to ask himself: Is this an order for the compulsory purchase of any land belonging to a local authority? If so, has that local authority duly objected? If it is found, when those questions are asked as at that date, that none of the land comprised in the compulsory purchase order is the property of a local authority, it seems to me necessarily to follow that no case for special Parliamentary procedure has arisen or can thereafter arise, for, if the local authority is not the owner of any of the land, it cannot object in any relevant sense, and if it becomes for the first time owner of some of the land after the time allowed for making objections has expired, no objection it then makes as owner can be "duly made".

I think it is plain in the context that the objection referred to in para. 9 must be an objection by the local authority as owner of some part of the land, and that any objection it may make otherwise than as such owner is nihil ad rem for the purposes of that paragraph. If, when reviewing the situation as at the date immediately following the period within which objections are to be made, one finds that some local authority, not being the owner of any part of the land, has, otherwise than as owner, made an objection of some kind, that does not, in my view, affect the matter. The opposite construction involves, to my mind, the very odd conclusion that if within the time prescribed for making objections a local authority chooses to make some objection or other, not at that time having any interest in the land, then the question whether special Parliamentary procedure will be necessary or not is left at large, I know not for how long, because possibly that local authority, having already objected on quite different grounds, may fulfil the other condition of para. 9 by becoming the owner of the land. That is a construction of para. 9 which I am unable to accept, and I think it is reasonably plain that what is necessary under that paragraph is that a local authority should be the owner of some of the land concerned, and as owner should have made an objection within due time and not withdrawn its objection.

It seems to me that *Marriott v. Minister of Health* (1), on which the learned judge, to some extent, founded himself is directed to a different point. The point there was that in the event which happened the area to which the compulsory purchase order related had been so dealt with that at the time when the confirmation of the order was under consideration it had ceased to be a clearance area so that the statutory foundation for the proposed compulsory acquisition could be said to have gone. There is nothing of that sort in the present case. The position here is simply that in certain circumstances land of a particular description, namely, land owned by a local authority, can only be acquired compulsorily through the medium of the special Parliamentary procedure, and the question is whether, on the true construction of the relevant provisions of the Act of 1946, the circumstances of the present case were, in the events which happened, such as to bring the special Parliamentary procedure into play. For the reasons given by my Lord and those which I have endeavoured to express, I consider that this question should be answered in the negative, and that the appeal should, accordingly, succeed.

HODSON, L.J.: I agree.

Appeal allowed.

Solicitors: *Solicitor, Ministry of Housing and Local Government* (for the Minister); *H. D. Clark*, town clerk (for the borough council); *C. W. Radcliffe* (for the county council). G.F.L.B.

(1) 100 J.P. 432; [1936] 2 All E.R. 865; [1937] 1 K.B. 128.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., FINNEMORE AND McNAIR, JJ.).

October 8, 1952.

REG. v. CLYDE WILSON, Esq. (Metropolitan Magistrate).

Ex parte PEREIRA

Bastardy—Child born abroad—Mother then domiciled abroad—Mother subsequently resident in England—Putative father Englishman domiciled in England—Jurisdiction to issue summons—Bastardy Laws Amendment Act, 1872 (35 and 36 Vict., c. 65), s. 3—Maintenance Orders Act, 1950 (14 Geo. 6, c. 37), s. 27 (2).

On July 15, 1950, the applicant, a British woman, then domiciled in Gibraltar, gave birth in Gibraltar to a bastard child. She subsequently came to reside in England, and on Jan. 25, 1952, she applied to a metropolitan magistrate to issue a summons under s. 3 of the Bastardy Laws Amendment Act, 1872, for an affiliation order against the putative father, an Englishman domiciled in England. The magistrate held that he had no jurisdiction to issue the summons. On a motion by the applicant for an order of mandamus against the magistrate,

HELD, that s. 27 (2) of the Maintenance Orders Act, 1950, had not altered the established law that bastardy proceedings could not be brought in England in the case of a child born abroad to a mother who, at the time of the birth, was domiciled abroad, and, therefore, the magistrate was right in refusing to issue the summons.

Reg. v. Blane (1849) (13 J.P. 825) and *Tetau v. O'Dea* (1950) (114 J.P. 499), applied.

MOTION for order of mandamus.

On July 15, 1950, the applicant, Miss Pereira, a single woman then domiciled

in Gibraltar, gave birth to a female bastard child in Gibraltar. Subsequently she came to reside in England, and on Jan. 25, 1952, she applied to Clyde Wilson, Esq., a metropolitan magistrate, to issue a summons under s. 3 of the Bastardy Laws Amendment Act, 1872, against the respondent, Ralph Kershaw, whom she alleged was the father of her child and was an Englishman domiciled in England. The magistrate held, on the authority of *Reg. v. Blane* (1) and *Tetau v. O'Dea* (2), that he had no jurisdiction to issue the summons and the applicant obtained leave to apply for an order of mandamus requiring the magistrate to issue the summons and determine it according to law.

Vowden for the applicant.

D. J. L. Fitzgerald for the respondent.

LORD GODDARD, C.J.: This is an application for an order of mandamus directed to Mr. Clyde Wilson, the metropolitan magistrate sitting at the South Western Magistrate's Court, requiring him to issue and determine a summons under the Bastardy Laws Amendment Act, 1872, and the Maintenance Orders Act, 1950, against the respondent, Ralph Kershaw, alleged to be the father of a bastard child born to the applicant. The learned magistrate, having considered *Tetau v. O'Dea* (2), a recent decision of this court, refused to issue a summons on the ground that the child was born at Gibraltar of a mother who was at that time domiciled at Gibraltar.

I think it is unnecessary to say more than that *Tetau v. O'Dea* (2) is an authority which completely justifies the magistrate in the view which he took. That case followed *Reg. v. Blane* (1), which was decided in 1849 and has never been overruled, although there has been a good deal of legislation with regard to bastardy since that date. So, too, after *Tetau v. O'Dea* (2) was decided on July 24, 1950, the Maintenance Orders Act, 1950, was passed on Oct. 26 of that year, and so there would have been time, had the legislature desired it, to change the law and deal with it in that Act, though, if that had been done, I think that objection would have been taken that it was outside the long title to the Act, which is:

"An Act to enable certain maintenance orders and other orders relating to married persons and children to be made and enforced throughout the United Kingdom."

Looking at the Act of 1950, I think that it merely enables maintenance and similar orders made in one part of the United Kingdom to be enforced in another part and deals with similar matters, and I do not think that the law relating to the present question is in any way altered by the Act. Therefore, it seems to me that *Tetau v. O'Dea* (2) applies, because the ratio decidendi of that case was not the nationality of the parties but the fact that the child was born abroad of a mother domiciled abroad at the time of its birth.

Rex v. Humphrys, Ex p. Ward (3) conflicts, to some extent, with *Reg. v. Blane* (1), which we followed in *Tetau v. O'Dea* (2), but in *Rex v. Humphrys* (3) both the putative father and the mother were domiciled in England. The mother had gone abroad, the child was born abroad, and after its birth the mother returned to this country. The court drew a distinction between the facts in that case and the facts in *Reg. v. Blane* (1). BANKES, J., said:

"If the facts proved before the magistrates show that the status of the child is governed by some foreign law so that the fulfilment of the condition precedent cannot be proved without recourse to foreign law, then no doubt

(1) (1849), 13 J.P. 825; 13 Q.B. 769.

(2) 114 J.P. 499; [1950] 2 All E.R. 695; *sub nom. O'Dea v. Tetau* [1951] 1 K.B. 184.

(3) (1914), 79 J.P. 67; *sub nom. Rex v. Humphrys, Ex p. Ward*, [1914] 3 K.B. 1237.

the case would fall within the principle of *Reg. v. Blane* (1); but in the absence of such evidence it is not the law, and *Reg. v. Blane* (1) does not decide, that in the case of a bastard child of English parents the mere fact that the child is born abroad bars bastardy proceedings."

The mere fact that the child of a mother domiciled in this country is born abroad does not bar proceedings, but, in the case which is now before us, at the time the child was born the applicant was domiciled abroad. Whether or not she has now changed her domicile is another matter. She says that she is now resident in this country and intends to stay here, but the evidence in regard to that matter is not such as the court would accept on the question of a change of domicile. However, we need not decide that question because it is admitted that the applicant was domiciled in Gibraltar at the time the child was born, and, therefore, the magistrate was right in refusing to issue a summons, and this application fails.

FINNEMORE, J.: I agree. Counsel for the applicant tried to distinguish this case from *Tetau v. O'Dea* (2) and *Reg. v. Blane* (1) on the ground that in each of the two earlier cases the mother was a foreigner, in the one case a German, and in the other a Frenchwoman. It seems to me, however, that that was not the ratio decidendi, the important point, in each case, being that at the time of the birth the mother was domiciled abroad. In the present case the applicant was domiciled in Gibraltar at the time of the birth and the child was born in Gibraltar. The facts, therefore, are quite different from those in *Reg. v. Humphrys, Ex p. Ward* (3), in which the majority decision was that, where the mother was still domiciled in England, the fact that she was abroad when the child was born was not necessarily a bar to proceedings in this country under the bastardy laws. If, however, the mother is domiciled abroad at the time of the birth, it seems to me that the case is one which cannot be dealt with in the courts of this country under the bastardy laws, and, therefore, in the case which is now before us, the magistrate was right in refusing jurisdiction.

McNAIR, J.: I agree. I think that the case is clearly covered by *Reg. v. Blane* (1) and *Tetau v. O'Dea* (2). I was at first disposed to think that the law might have been changed by s. 27 (2) of the Maintenance Orders Act, 1950, which received the Royal Assent some three months after the decision in *Tetau v. O'Dea* (2) had been given, but, on re-consideration, I think it is possible to read the concluding words of that sub-section in a more limited sense as dealing only with a case where the child has been born in some part of the United Kingdom.

Application refused.

Solicitors: *R. W. Platt* (for the applicant); *T. D. Jones & Co.*, agents for *George Clough & Willis*, Bury (for the respondent).

T.R.F.B.

(1) (1849), 13 J.P. 825; 13 Q.B. 769.

(2) 114 J.P. 499; [1950] 2 All E.R. 695; *sub nom. O'Dea v. Tetau* [1951] 1 K.B. 184.

(3) (1914), 79 J.P. 67; *sub nom. Reg. v. Humphrys, Ex p. Ward*, [1914] 3 K.B. 1237.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., FINNEMORE AND MCNAIR, JJ.)

October 10, 1952

SAYCE v. COUPE

Customs—Keeping uncustomed goods—Intent to defraud revenue—Use of goods by purchaser—Customs Consolidation Act, 1876 (39 and 40 Vict., c. 36), s. 186.

Tobacco—Sale by unlicensed person—Aiding and abetting by purchaser of sale—Tobacco Act, 1842 (5 and 6 Vict., c. 93), s. 13.

The respondent purchased a quantity of cigarettes from a person who, to his knowledge, was not licensed to deal in tobacco, being informed that the cigarettes had been honestly obtained and were part of an order given by a café proprietor which he no longer required. Next day the respondent discovered that each of the packets was sealed with a label indicating that the cigarettes were duty free and intended only for the use of the United States Armed Forces. The respondent, therefore, informed the seller that the cigarettes were of no use to him, and the seller promised to take them back, but did not do so. Subsequently the respondent smoked some of the cigarettes and gave others away. On being interviewed by an officer of the Customs Investigation Department the respondent freely admitted the purchase by him and produced the remaining cigarettes. Justices dismissed informations preferred against the respondent for keeping uncustomed goods with intent to defraud the revenue, contrary to s. 186 of the Customs Consolidation Act, 1876, and for aiding and abetting a sale of tobacco by an unlicensed person, contrary to s. 13 of the Tobacco Act, 1842.

HELD, that, by dealing with the cigarettes in the manner in which he had, the respondent was guilty of both offences, and the cases must be remitted to the justices with a direction to convict.

CASE STATED by Oldham justices.

At a court of summary jurisdiction, sitting at Oldham on Mar. 3, 1952, the appellant, George Sayce, one of Her Majesty's officers of Customs and Excise, preferred informations against the respondent, Wilson Coupe, charging (i) that on Dec. 4, 1951, he knowingly kept uncustomed goods, namely, 3,580 American cigarettes with intent to defraud His Majesty of the duties due thereon, contrary to s. 186 of the Customs Consolidation Act, 1876; and (ii) that on Nov. 24, 1951, he did aid, abet, counsel, and procure a person unknown to sell certain tobacco, viz., 5,600 cigarettes, otherwise than as a licensed manufacturer of, or dealer in, or retailer of, tobacco, selling tobacco in his entered premises or on premises wherein he carried on the business of a licensed dealer in, or retailer of, tobacco, contrary to s. 13 of the Tobacco Act, 1842.

It was proved or admitted that on Nov. 24, 1951, two American soldiers in plain clothes visited the respondent's premises in company with one Wood, who was a man of good character well known to the respondent. The respondent was invited by Wood to buy a quantity of American cigarettes then in the possession of the two American soldiers, and he bought from twenty-four to twenty-eight cartons each containing ten packets of twenty cigarettes, for which he paid Wood £38. The price paid for each packet was said by the soldiers to be the wholesale price of the cigarettes. One of the soldiers stated that similar cigarettes were on sale in all the public houses in Warrington, that he was supplying such cigarettes to a café proprietor in Blackpool, and that the cigarettes offered to the respondent were part of an order requested by that café proprietor which he did not now require. The soldier and Wood further stated that the cigarettes were honestly obtained. The cartons, containing from four thousand eight hundred to five thousand six hundred cigarettes, were then delivered into

the possession of the respondent who gave two cartons to Wood. On the following morning the respondent examined the cartons and discovered that each of the packets was sealed with a label indicating that the cigarettes were duty free and only for use of the United States armed forces. The respondent thereupon informed Wood that, as the cigarettes were duty free, they were of no use to him. Wood said that the American soldiers would be returning in a month's time, and that he, Wood, would take them back. On Dec. 4, 1951, the respondent was interviewed by an officer of the Customs Investigation Department and admitted without hesitation the purchase of the cigarettes and produced from a room upstairs seventeen cartons and from behind the counter of the bar nine packets, together 3,580 cigarettes. Between Nov. 24 and Dec. 4 the respondent and his wife had smoked some of the cigarettes and he had given others to his customers, together between 1,220 and 2,020 cigarettes. The respondent was licensed to sell tobacco and had previously obtained all his supplies from one Ainsworth in Oldham. The respondent was aware that Wood was not licensed to sell tobacco, but thought that the cigarettes had come through a licensed dealer.

It was contended on behalf of the appellant (a) that, even though the respondent denied on oath any intent to defraud, yet, as he had used and disposed of a considerable quantity of the cigarettes after he had become aware that they were imported duty free for the use of members of the United States armed forces, he must have intended to defraud His Majesty of the duties and was guilty of the offence charged under the first information; (b) that his purchase of the cigarettes from Wood or the American soldiers constituted the offence charged under the second information. It was contended on behalf of the respondent (a) that he had given an explanation of how he had come to purchase the cigarettes which, at the time of the purchase, he did not know to be uncustomed, and that this explanation indicated that he had no intent to defraud or to act dishonestly in any way; (b) that on his becoming aware that the cigarettes were uncustomed his conduct and expressed intention indicated that he had no intent to defraud; and (c) that he was an honest trader who had, in fact, no intent to defraud.

The justices accepted as true the respondent's statement that he had no intent to defraud and dismissed both summonses. The officer of Customs and Excise appealed.

J. P. Ashworth for the appellant.

F. P. R. Hinchcliffe for the respondent.

LORD GODDARD, C.J., stated the facts and continued: The justices dismissed both informations against the respondent. We understand the reasons why they dismissed the first summons, although we do not agree with them, but we do not understand why they dismissed the second summons, to which it does not seem to the court there was any defence and in spite of the argument of counsel for the respondent we are of opinion that the appeal must be allowed on both points.

The first information was laid in respect of keeping, and not of dealing in, the cigarettes, but it is obvious from the way the Case is stated and the conclusion of the justices that the matter was fought in the court below on the basis that the only issue raised was whether there was any intent to defraud. It seems to me that there could have been no answer to a charge of dealing in the cigarettes because the respondent had dealt in them by smoking them and giving them away. The only inference to be drawn from the fact that the respondent was keeping the cigarettes is that he intended to go on doing what he was doing.

The respondent, who seems to have been perfectly frank throughout, did not attempt to say he was going to do anything else except that at some unspecified time he would have given any that were left to the American soldiers. I am not going to say that the justices came to a perverse decision because they set out exactly their train of reasoning and the facts on which they relied, but I do say that they have misdirected themselves and misunderstood the nature of the offence and the wording of the statute. Where people are found dealing, to use the word in a general sense, with uncustomed goods, knowing them to be uncustomed, they are defrauding Her Majesty of the duty. They know that if they smoke uncustomed goods the duty which ought to have been paid before the goods were consumed or dealt with will not be paid.

In *Rex v. Cohen* (1) I endeavoured to assist justices who have to try these customs cases either at quarter sessions or in courts of summary jurisdiction, and in giving the reserved judgment of the court I said:

"Another ingredient of the offence is the intent to defraud, and of this the jury should be reminded, but, as in all cases where an intent to defraud is a necessary ingredient, the intent must usually be inferred from the surrounding circumstances. If a jury is satisfied that the accused knew, which would include a case in which he had wilfully shut his eyes to the obvious, that the goods were uncustomed, and he had them in his possession for use or sale, it would follow, in the absence of any other circumstance, that he intended to defraud the revenue."

I put in *ex abundanti cautela* those words "in the absence of any other circumstance" because the changes and chances in this mortal life are so manifold and circumstances are so diverse that it is possible to conceive that some answer might be available to the defendant. I think the justices came to the conclusion that the respondent was a very respectable man of good character. Perhaps they thought that he did not realise that he was defrauding the revenue. That, however, is not an answer to the charge. If people are dealing in this way with uncustomed goods, they defraud the revenue, and that is enough. It may be that there is not the same moral stigma or blame which is attached to many cases of fraud, but a person defrauds the revenue if knowingly and consciously he acts with dutiable goods in such a way that the customs are deprived of the duty. For these reasons we shall send the first information back to the justices with an intimation that an offence was proved on the first information and it is their duty to convict.

The justices have given no reason for dismissing the second information, but it is abundantly clear that the respondent, who himself was licensed to deal in tobacco, could have taken the trouble to learn what are the obligations of a person who holds such a licence. Here is a man, who previously bought all his supplies from somebody else, suddenly buying large quantities of cigarettes from another man whom he knows is not a tobaccoist and has not a wholesale licence. If he does not know that that is an offence, it is his duty as a licensee to know the conditions under which he can trade, and this was a sale in disobedience of the statute. This second charge should not be treated as a technical offence, any more than the first charge. The second summons charges the respondent with aiding and abetting "a person unknown" (who must have been Wood) to commit the offence, that is to say, buying these goods from a person whom he knew was not a licensed dealer in tobacco. Counsel for the respondent has argued that because the statute does not make it an offence "to buy", but only makes

(1) 115 J.P. 91; [1951] 1 All E.R. 203; [1951] 1 K.B. 505.

it an offence "to sell", the charge of aiding and abetting the sale cannot be preferred. It is obvious that it can be preferred. The statute does not make it an offence to buy, but none the less, on ordinary general principles of criminal law, a person who, knowing the circumstances and knowing that an offence is being committed, takes part in or facilitates the commission of the offence, becomes guilty as a principal in the second degree, and, therefore, it is impossible to say that a person who buys does not aid and abet a sale. For these reasons the justices ought also to have convicted on the second information.

FINNEMORE, J.: I agree.

McNAIR, J.: I agree.

Appeal allowed. Case remitted.

Solicitors: *M. G. Whittome, Solicitor for Customs and Excise* (for the appellant);
C. J. C. Davenport & Son, agents for Lees & Riches, Oldham (for the respondent).
T.R.F.B.

COURT OF APPEAL

(SINGLETON, BIRKETT AND MORRIS, L.JJ.)

October 6, 7, 1952

WRIGHT v. CHESHIRE COUNTY COUNCIL

Negligence—Schoolmaster—Physical training—Liability of education authority—Approved system of supervision—Regular and recognised practice.

The defendants, as education authority, were responsible for the management and control of a school at which the plaintiff, a boy aged twelve years, was a pupil. In the course of physical training exercises the plaintiff, with other boys, took part in the exercise of vaulting the "buck". When the boys did the exercise for the first time the instructor remained at the receiving end of the buck to assist them as they came over, but after they had had a little experience it was his practice to depute to the boys the duty, as each completed his vault, to wait to receive the next one over. On one occasion as the plaintiff was in the act of vaulting, the school bell denoting playtime rang, and the boy who should have remained to receive him ran off, the plaintiff fell, and sustained injuries. On a claim by him against the defendants for damages for personal injuries on the ground that the defendants had been negligent in not supervising the exercise adequately, evidence was given that the practice followed by the instructor of leaving the boys to carry out the exercise by themselves was the approved practice in schools, as it tended to give the boys self-confidence, but evidence was also given by an instructor of experience that he considered the practice dangerous and would not himself adopt it.

Held: there was a presumption that a practice which was generally adopted and followed successfully for many years was a proper practice to follow; the evidence to the contrary in the present case was insufficient to rebut this presumption; and, accordingly, the defendants had not been guilty of negligence and were not liable in damages.

APPEAL by the defendants from a decision of McNAIR, J., that the defendants had been negligent in not performing the duty which they owed to the plaintiff to exercise reasonable care, in that they had failed to give proper supervision over the exercises in which he was engaged.

Nelson, Q.C., and G. B. H. Currie for the defendants.

Sir Noel Goldie, Q.C., and Youds for the plaintiff.

SINGLETON, L.J.: In March, 1949, Roger Neill Wright, a boy of the age of twelve years, was a pupil at the Grange Secondary School, Ellesmere Port,

in the county of Chester. The Cheshire County Council, the defendants in this action, who are the education authority for the county, are responsible for the management and control of that school. On Mar. 25 the boy was injured in an accident in the gymnasium of the school. He sustained an injury to his right arm—in particular, to the elbow joint—and in due course he, through his father, commenced an action against the defendant county council, alleging that they were negligent in the control and management of the school and that by that negligence the injury to the infant plaintiff was caused. The county council denied any negligence. The action came on for trial before McNAIR, J., on Apr. 4, 1952, and he held that the defendants had been guilty of negligence and were responsible in damages to the plaintiff. Against that judgment the defendants appeal to this court.

On the afternoon of Mar. 25, 1949, the class to which the boy belonged had gone to the gymnasium. There were forty in the class, and it was in charge of a master and instructor, Mr. George. He split up the class into four parts, and the infant plaintiff was one of a party of ten who were vaulting over what is called a "buck". The case for the plaintiff was that there ought to have been an adult at the end, or near the end, of the buck, to receive the plaintiff and see that he came to no harm, that there was no adult there, and that thereby, when the plaintiff slipped, he was deprived of having the assistance which he would have had if there had been some competent person there to help him in case he needed help. The defendants' case was that it was not necessary to have an adult there to take charge of this particular squad.

The infant plaintiff, in the course of his evidence, said the boys vaulted the buck in turn, and that just before this accident he heard the bell ring, a bell which was a signal that play-time had arrived, and that that was the end of the gymnastic activities of the class. He said that he was on the buck when the bell went, that a boy who ought to have been at the receiving end of the buck disappeared, that there was no one to help him, and he fell on his elbow and damaged it. The plaintiff relied on the evidence of Mr. Charles Lord, who was a fellow and also an examiner of the British Association of Physical Training, and an organiser of physical training for the Y.M.C.A. on Merseyside, and who had had a long experience of gymnastics and of physical drill. He was asked by counsel whether he considered that the system adopted at this school was a safe system, and his answer was:

"In over fifty years' teaching I have never allowed a boy to stand in at the buck or the box. I think it is for an adult. It is a very precarious practice. I think the buck is the most useless piece of apparatus in the gymnasium."

The learned judge then asked him how high the buck was, and he said: "Three feet roughly, but it can go to six." Then the learned judge said to him:

"Q.—You say it is dangerous for boys to go over a buck three feet high ?

A.—Not having an adult to catch him, I do. Q.—What age of boy ?

A.—Any boy aged from nine upwards. Q.—A boy of eighteen ? A.—Well, yes, I would not even allow boys of eighteen to go over a buck by themselves. Q.—Three feet high ? A.—There is always a danger of a boy who is

rather tight in the muscles not being able to do an astride position to get over and falling backwards, and then he goes on the floor, because there is no mat where he takes off. Q.—I suppose you have seen leapfrog played ?

A.—Yes. I teach leapfrog in my own classes. Q.—And I suppose you have seen it played in the playground ? A.—Yes, but then they are doing it at their own risk. Q.—Do you think it is an unsafe sport ? A.—I do really, but boys

will be boys. In the gymnasium it is up to the teacher to see that there is no danger. If I have the buck I do not have the box. I do something else like long jump, balance walking and mat work. I had one or two slips in my early teaching career on the buck and decided to abandon it."

When that witness was cross-examined he was asked by counsel for the defendants whether or not the exercise, as performed in the gymnasium in the school on the day in question, was a regular exercise, and he answered:

"Yes. Q.—And one of the purposes of that is to inspire the boys with a little self-confidence and courage, is it not? A.—Yes. Q.—And provided the boy stays and does his job there is no risk involved, is there? A.—I think there is. There are very few boys I would allow to stand in at a buck. There are only certain boys gifted with what I call the courage to grip that boy. I have seen them when I have gone round examining. The British Association— Q.—I am not challenging what your personal view is, but the point is that right throughout the educational service there are thousands of teachers teaching p.t.? A.—Yes. Q.—And they all teach this method? A.—Yes. Q.—It is the recognised method? (No reply). (McNAIR, J.): Do you agree with that? A.—I do not. Q.—Do you agree that it is the recognised method? A.—I have heard of it, but I myself do not approve of it. A lot of things the Board of Education recommend I do not stick up for. (Mr. Nelson): My Lord is asking you this: You know that is what they do? A.—They do, I know. Q.—But you say you do not approve of it, but you know from the reference books that is the recognised method? A.—They do. They recommend the boys for standing in."

In re-examination by counsel for the plaintiff the witness was asked:

"Q.—Therefore what you are saying, as I understand it, is that you do not approve of it. You say an adult ought to be there, and you say the Board of Education allow lads to be there? A.—Yes, I know they do by the reference books."

Evidence was given by several of the boys, and there was a question of fact on that which had to be decided, and was decided, by the learned judge. Evidence was given, too, by the master, Mr. George, a trained and experienced physical trainer and gymnastic instructor. He said he followed the ordinary practice, the practice in which he had been trained, and he considered it good practice after the boys had been under him and directly supervised by him for a while. They only had to clear a three foot buck lengthwise, and it was about one foot six inches, or, perhaps, a shade more, long. It was good practice that they should be left to themselves, one of the ten in turn being at the receiving end of the buck where there was a mat. He said that, apart from the fact that it was found to be good in practice, it was good training for the boys that one should rely on the other, and that one should be there to help the other in case of need. That was the recognised practice followed everywhere so far as he could find, although the plaintiff's expert witness said he did not approve of it.

The class of forty, all boys about twelve years of age, was split up into four parts or squads. Each of the squads was on a different form of exercise from the others. The master in charge, Mr. George, supervised the work. The members of the squad, of which the plaintiff was one, had to vault in turn over the buck three feet high and one foot six inches long. That would not appear to be a particularly hazardous operation, as there was a mat at the end at which the

boy landed. The plaintiff himself had been some seven months at the school. He had done this exercise on many occasions before, and he had cleared the buck on four occasions on this very day without anything untoward happening. Mr. George had had this squad under his care until they were accustomed to vaulting the buck, and when he thought they were fit to carry on without an adult in immediate proximity he left them to do that which they were doing on the day of this accident. One of the ten boys went to the receiving end, and the other nine were in a queue. The first of the queue went over the buck with the one waiting to receive him and to aid him if necessary. Then the receiver went to the end of the queue, and the remainder of the boys followed over the buck in turn, one always standing at the receiving end. As I have said, this was the regular and the recognised practice not only in this school, but in other such schools, as the expert witness called on behalf of the plaintiff admitted. The boys were all the time within the view of Mr. George, though he himself was giving his first attention to a more advanced exercise in which the boys went over a higher and more difficult obstacle.

The case for the plaintiff alleging negligence was based almost wholly on the evidence of Mr. Lord, who gave the answers to which I have referred already. The learned counsel were agreed on the law to be applied. The measure of duty owed by the defendants, as the education authority, is that which a reasonable parent should exercise towards his child. It is a duty to take reasonable care, no more and no less. McNAIR, J., held that the defendants were responsible, and he said:

"Though I hope I am the last to express the view that boys of ten or twelve require mollycoddling or nursing, it does seem to me that this particular operation, which is admittedly unsafe for these boys unless there is someone to receive them, ought to have demanded that there should be some adult ready to receive the boys or support them on landing, and that it was not a proper discharge of the defendants' duty to exercise the care of a reasonably careful parent to allow that duty of supporting the boys on landing to be discharged solely by a small boy of the age of these boys. It seems to me that the circumstances of the case as disclosed to me in the evidence require that an adult should be physically present at any time when boys of this age are performing this particular operation."

With all respect, I do not think that that can be right on the evidence which was before the court. I recognise that this is largely a question of fact, but the proper test must be applied. The evidence on both sides showed that the ordinary and recognised practice was being followed, and the plaintiff's expert witness agreed that it was the practice recommended in books on the subject, and one which gave boys a sense of responsibility. He said, however, that he did not like it and would not recommend that even boys of eighteen should vault over a three foot buck without an adult to aid them. I find it difficult to appreciate the view of that witness. Entirely apart from that, I cannot see how it can be said that the defendants were negligent if they adopted the well-recognised practice in a matter of this kind. The view of the plaintiff's witness would seem to indicate the necessity of having four adult instructors in the gymnasium for a class of forty boys. I cannot accept that. There may well be some risk in everything one does or in every step one takes, but in ordinary everyday affairs the test of what is reasonable care may well be answered by experience from which arises a practice adopted generally, and followed successfully over the years so far as the evidence in this case goes. Indeed, it would appear from the judge's findings of fact that the cause, or a cause, of the

accident to the plaintiff was that the boy who ought to have been standing by the mat left his post when the bell sounded. The bell was an indication of a break for play-time. In the ordinary course the boys, on the sound of the bell, would receive an order to go to the corner at which their squad paraded before being dismissed. Why should the defendants apprehend that on this, or on any, occasion the boy would run away when the plaintiff was in the act of vaulting? So far as we know, that sort of thing had never happened before. The boys all had experience, seven months, in this school, and the plaintiff (and no doubt the other boys) had been in a junior school before and had taken part in physical exercise and drill. In my opinion, the judgment in favour of the plaintiff cannot stand on the evidence which was before the court, and I would allow this appeal.

BIRKETT, L.J.: I am of the same opinion. The question before the learned judge in the court below was: Was there evidence of negligence on the part of the defendants which occasioned the accident to this small boy, and the answer of the learned judge, if I may put it in a sentence, was: I think they were negligent, and they were negligent in this, that while this exercise was being performed by the boys, it was negligent not to have an adult present during the exercise. Two passages only from the judgment will I cite on that. The first is:

"... the chief question it seems to me is whether it was the duty of the defendants to ensure that when this exercise was being performed there was always in attendance at the buck an adult, both to give adequate supervision of the exercise and see that it was properly carried out, and more particularly to stand by himself so as to support the small boys as they came over."

The second passage is:

"In those circumstances, the question upon which I have to make up my mind is whether this was an operation of such potential danger to these lads as to require the actual presence of the instructor at the buck at the time."

It seems to me to be quite clear that the ground on which the learned judge found against the defendants was that they had failed in their duty because they did not have an adult to supervise this exercise. Counsel for the plaintiff naturally laid great stress on the fact that this was a question of fact. In considering a question of fact, what amounts to reasonable care in any given set of circumstances depends entirely on the circumstances known to the defendant whose conduct is the subject of inquiry. That was the statement of **BANKES, L.J.**, in *Harnett v. Bond* (1). It is clear that whether, in the circumstances known to the defendant, the instructor used due care—that is, whether he exercised the care a reasonable and prudent man would exercise—is a mere question of fact as to which, of course, no legal rules can be laid down. I would like to refer to an observation which **LORD MACMILLAN** made in *Glasgow Corpn. v. Muir* (2):

"... the standard of care of the reasonable man involves in its application a subjective element. It is still left to the judge to decide what in the circumstances of the particular case the reasonable man would have had in contemplation and what accordingly the party sought to be made liable ought to have foreseen."

(1) [1924] 2 K.B. 517; *affd.* H.L., 89 J.P. 182; [1925] A.C. 669.

(2) 107 J.P. 140; [1943] 2 All E.R. 44; [1943] A.C. 448.

With regard to *Gibbs v. Barking Corpn.* (1), it is clear that that was a decision by the learned county court judge on a question of fact whether in the particular circumstances of that case the master in charge was negligent. The learned county court judge having found that he was, the Court of Appeal refused to disturb that finding of fact. I say that because counsel for the plaintiff stressed the fact that McNAIR, J., had made a finding of fact in this case. I think myself that everything turns on the nature of the exercise which was being performed at the moment the accident occurred. I do not think it was in any sense a dangerous exercise, but it was, of course, an exercise that needed care in its performance. Here was a boy of twelve years of age who had had seven months' training, and it was clear from the answers which he gave in the case that he himself did not regard this exercise as one involving any great risk. Counsel for the plaintiff asked the boy to explain the nature of the exercise, and the boy said:

"You would form a line, and then the first one would go over and stand there and support the next one over and when the next one came over the boy that had supported before ran round to the back of the queue and so on."

Observe the word "support". The judge then said:

"You leapfrog over the buck, do you, as you might do in the playground over another boy?"

and he answered "Yes." A little later counsel for the plaintiff introduced a new word, "catch", and he put these questions to the plaintiff:

"Q.—Was the system which you have told us about one boy waiting to catch another—do you follow? A.—Yes. Q.—Was that the ordinary everyday system they had in the school? A.—Yes. Q.—Did they ever have a master or grown-up present standing beside the buck to catch you as you came over? A.—He used to come round at regular intervals to see how the boys were getting on and sometimes he stood there. Q.—He used to come round and see how the boys were getting on and stood there sometimes? A.—Yes. Q.—But on this occasion, as you have said, the ordinary system was going on, one boy waiting until the next one came. Is that right? A.—Yes."

Later, counsel for the defendants said:

"Q.—On every occasion Mr. George would divide the classes up into four groups. A.—Yes. Q.—He would look after the group doing the most difficult exercises? A.—He would walk round them all. Q.—If one group was doing a very difficult job he would go and watch? A.—Yes. Q.—What you were doing on this occasion was one of the simplest, was it not? A.—Well, the second hardest. We throw balls to one another in one group and toss about sticks in the other. Q.—It is a very simple job to vault the buck? A.—Yes. Q.—You had done it many times before this day, had you not? A.—Yes. Q.—And you were quite proficient at it? A.—Yes. (McNAIR, J.): Was this the first time you had gone over the buck without a boy at the other side to receive you? A.—Yes."

I have quoted those passages from the boy's evidence to emphasise what I think is always of first importance in cases of this kind. In assessing the reasonableness of the care that should be taken, the nature of the activity is an essential factor in determining whether the act of the defendant was tortious

or not, and here it would appear from the evidence of the boy that this was an exercise which was being performed (subject to what my Lord has said and to what I shall say in one moment) in the ordinary way in which it had been done many times before, at which the boy was proficient, and it was regarded as a simple exercise. I do not think it is of very great help to compare other activities of boys, like climbing trees, or taking part in a hurdle race, or playing rugby football, all of which obviously entail risk. The sole question in this case is: Having regard to the nature of the exercise, has it been proved that the defendants were negligent, so that their negligence is shown to be the cause of this accident?

I do not propose to deal at any length with the evidence. Mr. George, who was the responsible instructor in the gymnasium, gave evidence before the judge, and in a sentence he said: This exercise does require care, and I give it in this way. When the boys are beginners, I supervise them personally. Then, as they progress and become more proficient, they pass on to more difficult things, and when they are doing the more difficult things I stand by to see that they are properly done, but all this is preparatory to the ideas which we have before us of making the boys self-reliant, giving them initiative, so that, when it is quite safe, they may do it by themselves. The evidence of Mr. George was that, that preparatory training and instruction having been given, the boys (as the infant plaintiff himself said) followed this system of one boy waiting to support, not to catch, the other boy as he vaulted over the buck.

The only difficulty in the case was the evidence of Mr. Lord on the other side, and it would be quite wrong for me sitting here, not having seen Mr. Lord, to make anything in the nature of any adverse comment on his evidence. He was a man of seventy-two years of age who had had very many years' experience, and his answers made it perfectly plain that he did not approve of the buck being there at all, to start with, and he would not have had any exercise performed with the buck if he had had his own way, but he made it abundantly plain also, when pressed in cross-examination, that there were thousands of physical training instructors carrying out similar duties to Mr. George, who were adopting this self-same system, and when further pressed he said he knew that it was the recognised system. Indeed, the learned judge in his judgment goes the length of saying (although I do not think there is any precise evidence on this matter) that the training manual as put forward by the Ministry of Education recommended that that process be adopted. I mention that to emphasise what I think my Lord has already emphasised, and that is that the general rule that a defendant charged with negligence can clear himself if he has shown he has acted in accordance with the general and approved practice has some application at least. It is true that the general practice may not conform to the standard of care required by a reasonable and prudent man, but in the ordinary circumstances where you find a general standard in the medical profession followed by general practitioners, or a general standard in the educational profession followed by physical training instructors, and a defendant can come and say: "In all that I did I followed the approved practice generally adopted throughout the land", at any rate he is in a position of considerable strength to answer a charge of negligence.

On the second point, if it be said the general system does not accord with the standard of a reasonable and prudent man, all I desire to say is this, that when you have, as a fact in this case, a system in general use which had been adopted in this school and followed with perfect safety, so far as we know, until this day, it is a very strong thing indeed to say that the authorities were negligent.

I observe that the learned judge, who attached some importance to this case, said:

"If the authorities had really applied their minds to this problem, it ought to have been within the range of reasonable foreseeability that these small boys, however well trained and however obedient, might not adequately perform their function of supporting."

So the authorities are being blamed because they allowed this system, with the boys operating in the way they did, to be the system in vogue. For my own part, if I were asked what would a reasonable and prudent man do, I think, first of all, he would have regard to the nature of the exercise, and the nature of the exercise, as I see it, requires care, but it is not in itself a dangerous operation, and I think, further, that, if there had been a system in vogue, as there was here, whereby a boy waited to support the boy vaulting, a reasonable and prudent man would say: "If the boy has been made proficient by his training, there was no negligence in not having an adult there." It is, I think, impossible to avoid the conclusion that it was a most unfortunate, unforeseeable, and quite unpredictable thing which occasioned the accident on this day. There was, of course, a great contest about how the accident happened; it was said that the boy himself disobeyedly made the leap after the bell had sounded. The judge found conclusively against that, and so it goes out of this case, but it was the ringing of that bell which occasioned the trouble, because the supporting boy, answering the bell and the cry of "fall in", was not there. It appears that this was the first time such a thing had happened. In those circumstances, I feel it is impossible to say on the facts that any negligence was shown on the part of the defendants, and for these reasons, and for the reasons which have already been given by my Lord, I agree with the conclusion that this appeal ought to be allowed.

MORRIS, L.J.: I am of the same opinion. The question raised in the action was whether the defendants, through their servant, had adopted a system which ensured that reasonable care was taken of the safety of a pupil. The defendants' servant was under an obligation to take that measure of care and to adopt those standards that would be taken, or adopted, by a reasonably careful parent. That does not involve that the adopted system would have to be such that in no foreseeable circumstance or situation could there be any possible or conceivable contingency or some slight mishap. If that were so, the activities of the young would be unduly circumscribed and only inactivity and inanition could be planned. The learned judge recorded that Mr. George, the physical training officer of the school, was a man of experience, and that he followed the practice of educating his boys in vaulting the buck. He took them along a progressive course of training. At first the boys only had to jump on to the buck and Mr. George helped them down. Then by degrees they were put through the whole operation, which consisted in running up to the buck, putting their hands on it and leapfrogging over it on to the mat on the floor. The learned judge said in his judgment, in regard to the course followed by Mr. George, as follows:

"During the first part of the training, until the whole class was proficient, Mr. George himself would stand by the buck either to steady these boys on the buck as they came up to it or steady them as they came to land. The final stage, and obviously a very desirable part of the training, was that the boys themselves were trained to act as supporters, in this way, that the first over the buck would be met and supported by the last boy in the team, and as they came over one after the other the boy who had

safely cleared the buck stood by as supporter for the next one coming over. The process of training was obviously right and proper, because it developed self-reliance in the boys and educated them in co-operative exercises."

I do not propose to refer to the facts, which have been so fully recited by my Lords, but it appears that this boy of twelve had been trained in the way described by the learned judge and had made progress which the physical training officer considered entitled him to take part in the later stage of the exercise. The passages cited by BIRKETT, L.J., show that the boy himself regarded the operation of vaulting the buck as very simple, and he himself considered that he was quite proficient at it. He had been at the school seven months; he did gymnastic training three times a week for about thirty-five minutes. The process of vaulting the buck was done in the gymnasium where Mr. George, the physical training officer, was present. Mr. George was asked by counsel for the plaintiff the following question, and made the following answer:

"Q.—You have agreed that children need great supervision. Would you tell me how often that morning you went to see that your system, whether good or bad, was being carried out? A.—I could see quite clearly every few seconds that the system was being carried out. I could see from my position."

On the facts it does not seem to me that it was necessary that there should be an adult in immediate proximity to the buck over which this boy was vaulting, and I do not see that there was any failure to adopt the standard of care to be expected of a reasonably careful and solicitous parent. I, therefore, agree that this appeal should be allowed.

Appeal allowed.

Solicitors: *Percy Hughes & Roberts*, Birkenhead (for the defendants); *Helder, Roberts & Co.*, agents for *John A. Behn, Twyford & Reece*, Liverpool (for the plaintiff).

C.N.B.

PROBATE, DIVORCE AND ADMIRALTY DIVISION

(LORD MERRIMAN, P., DAVIES, J.)

Oct. 6, 7, 8, 1952

SANDERS (or. SAUNDERS) v. SANDERS (or. SAUNDERS).

Husband and Wife—Desertion—Decision inconsistent with previous High Court finding—Justices ignorant of previous finding—Order for re-hearing.

On Jan. 23, 1950, the husband and wife parted, and on Feb. 21, 1950, the husband filed a petition for divorce on the ground of the wife's cruelty. The wife filed an answer merely denying the charge. The case was heard by a commissioner who, on June 28, 1951, held that the charge of cruelty had not been proved, but that, in any event, if it had been proved, it would have been condoned, and that it would not have been revived on Jan. 23, 1950, since on that date the wife had been ejected from the matrimonial home, and, therefore, was not then guilty of desertion. The petition was, therefore, dismissed. On Mar. 10, 1952, justices heard two summonses issued by the wife alleging against the husband desertion and wilful neglect to maintain. The justices were not informed of the previous High Court finding on the question of desertion and dismissed the summonses on the ground that the wife had been guilty of desertion on Jan. 23, 1950. On appeal by the wife,

HELD: (i) since the charge of cruelty had not been proved, the commissioner's findings on condonation and the absence of the revival of the offence by the wife's desertion were findings on matters not directly in issue before him, and, therefore, they could not operate as an estoppel binding the justices;

(ii) in any event, when there was an assertion of estoppel it should be brought to the notice of the tribunal alleged to be affected by it and supported by evidence of the matters from which the estoppel was said to arise, and neither of those steps had been taken;

(iii) since there was a previous contrary finding of the High Court on the same subject-matter, of which the justices had not been informed, the case should be sent back to them for re-hearing.

APPEAL by the wife against the dismissal, on Mar. 10, 1952, by justices for the Edmonton petty sessional division of summonses by her alleging against her husband desertion and wilful neglect to maintain.

The justices found that on Jan. 23, 1950, when the parties separated, the wife was guilty of desertion. This finding was inconsistent with a previous finding of Mr. Commissioner BLANCO WHITE, K.C., in divorce proceedings on June 28, 1951, that the wife had been ejected from the matrimonial home, and the wife now appealed.

Ellenbogen for the wife.

McKinnon for the husband.

LORD MERRIMAN, P.: This is a wife's appeal from the dismissal on Mar. 10, 1952, by justices for the petty sessional division of Edmonton sitting at Enfield of her summons alleging that her husband had deserted her and wilfully neglected to provide reasonable maintenance for her, the ground for the dismissal being that it was the wife who, on Jan. 23, 1950, the date of separation, had left the matrimonial home without any reasonable excuse—in other words, that she, and not the husband, was the deserter—and that, being the deserter, she could neither charge him with desertion nor obtain maintenance.

It is now said that the justices were precluded from making this finding by a decision of the High Court, which arose in this way. After the parting on Jan. 23, 1950, the husband, on Feb. 21, 1950, filed a petition for divorce on the ground of the wife's cruelty. To that petition there was a mere denial, no other issue being raised. There was no cross-charge of desertion, either as a plea in bar or otherwise, nor was there any suggestion of condonation on the pleadings. That petition was heard by Mr. Commissioner BLANCO WHITE on

June 26, 27, 28, 1951. The learned commissioner, in his judgment on June 28, found that the charge of cruelty was not made out to his satisfaction. Although the issue of condonation was not raised on the pleadings, that, of course, was not the end of the matter, for, if there was any indication in the evidence that the cruelty might have been condoned, it was the duty of the learned commissioner, under the Matrimonial Causes Act, 1950, s. 4 (1), to inquire into it, and it is clear that this issue was considered by him. It was, however, said on the other side: "If there was condonation, that does not avail the wife because she wrongfully left the matrimonial home, and by her desertion she revived the offence thus alleged to have been condoned."

It is a commonplace that the question of condonation cannot arise unless there is an offence to be condoned. It is obviously right that if, while the main issue is still in doubt, there is a suggestion that the offence may have been condoned, that must be investigated by the judge at the trial. Any question of cancellation of the condonation by the revival of the original offence must also be investigated. But in the end that is all completely academic unless the main issue is decided in favour of the petitioner. That does not mean that there is anything unwise or indiscreet in the judge expressing an opinion, for what it is worth, about all the issues that have been debated. That is one thing. Whether his opinion and his finding operate as an estoppel if in fact the issue does not arise at the moment when he is giving his judgment is another matter.

Without my reading the learned commissioner's judgment in full, he having, as I say, in detail and as a whole rejected the husband's charge of cruelty against the wife, he goes on to examine the evidence relating to condonation and concludes:

"I think if there had been cruelty in this case it would have been condoned. Mr. Barnard [counsel for the husband] says that, even so, that would not matter because it was the wife who deserted the husband, and that would have revived the cruelty. I do not accept that contention on the facts of the case . . . As to what happened on Jan. 23 [the day of the parting] I accept the wife's story that she was ejected from the matrimonial home by her father-in-law and the marriage thereby terminated."

It will be seen, therefore, that this finding that it was the wife who was ejected from the matrimonial home on the day of the parting was, so to speak, an issue at second remove from the issue which was being decided in such a way that this subsidiary issue could not arise at all. Yet it is said that that effects an estoppel in this case, binding the justices in such a way as to preclude their finding that the wife had left the matrimonial home without reasonable cause, and dismissing the summonses for desertion and wilful neglect to maintain.

I will come back in a moment to the point of law, but there is one other comment which falls to be made about this subject. When an estoppel is asserted it should, whether by the formality of pleading, as in the High Court, or in some other appropriate way, be brought to the notice of the tribunal alleged to be affected by it, and, having been brought to the notice of the court, it should be supported by specific evidence of the matters from which the estoppel is said to arise. Neither of these things happened in this case. The point was never even mentioned or hinted at before the justices. In my opinion, plain as was the learned commissioner's statement on this topic of a possible revival after a possible condonation of an offence which had not been committed, that does not constitute an estoppel on the question which of these two parties, if either of them, was the deserter on Jan. 23, 1950.

I come to what, in my opinion, is the more difficult point—the proper solution of the difficult situation which has arisen owing to the way in which this case was presented to the justices. Counsel for the husband, in addition to resisting the alleged estoppel, says that this case can be decided simply by looking at the finding of the justices, by looking at the notes of the evidence, by our holding that the ordinary principles guiding appellate tribunals which have not seen and heard the witnesses should be applied, and by our refusing to interfere with the decision of the justices, supported as it is on the face of the notes of the evidence. On the other side it is argued, alternatively to the question of estoppel, that this is a case in which there is no evidence to support the finding of the justices, and that, apart altogether from their being precluded by the earlier finding of the High Court, they ought not, on the merits as presented to them, to have found that the wife was disentitled to charge the husband with desertion or wilful neglect to maintain because she herself had been the deserter. Again, without going through all the details, I am satisfied that, if that were the sole issue in this case, it would be impossible for this court to reverse the finding of the justices.

[His LORDSHIP considered the evidence and continued:] It would, in my opinion, be impossible on any known principle for us, not having seen either of the parties or their witnesses, to say that the justices were wrong in deciding as they did.

It is, of course, impossible to speak—I am not now on the issue of estoppel, regarded as a point of law—of their having ignored the decision of the High Court, because they were not even told what it was or given any indication that their minds ought to be swayed by it in any way. In that respect it is unlike *James v. James* (1), a decision of this court, to which we have been referred. There, without deciding the issue of estoppel, though it is clear from a subsequent decision of the Court of Appeal in *Winnan v. Winnan* (2) that we ought to have done so, we expressed an extremely unfavourable opinion of a bench of justices having found a charge of adultery proved against a wife when a judge of the High Court, in respect of the same alleged act of adultery, on substantially the same evidence, and after a full trial, had held that the charge was insufficiently proved. That reproach, of course, cannot be made against these justices because, as I have said, they were not given a chance to deal with the matter. We now sit in the place of the justices, with power to draw any inference which they ought to have drawn. We are now the judges of fact, to be guided, no doubt, by certain principles, but the position at the present moment is not that it is impossible for us to interfere with the finding of the justices because, seeing the paper record but not seeing the witnesses, we happen to take a different view from that taken by them, for we have seen two sets of papers. It is true that we have not seen a transcript of the evidence which was submitted to the learned commissioner, but we have seen his findings, and it is indubitable that, for whatever purpose it was expressed, he arrived at a diametrically opposite conclusion on the question which of the two broke up the matrimonial home on Jan. 23, 1950, from that arrived at by the justices.

So the question really is: What, in these peculiar circumstances, is it our duty to do? In my opinion, it is impossible for us to content ourselves simply by looking at the proceedings before the justices in isolation and saying that, guided by *Watt (or Thomas) v. Thomas* (3) we cannot interfere. On the other

(1) 112 J.P. 156; [1948] 1 All E.R. 214.

(2) [1948] 2 All E.R. 862; [1949] F. 174.

(3) [1947] 1 All E.R. 582; [1947] A.C. 484.

hand, I think it is equally impossible for us, not having seen or heard the witnesses, to decide for ourselves which is the true inference of fact about the occurrences of Jan. 23, 1950, and thereafter. It seems to me, therefore, that only one course is left open, and that is to have a fresh hearing by those who can see and hear the witnesses. It must be remembered that there is a provision in the Summary Jurisdiction (Married Women) Act, 1895, s. 10, which enables justices to decide not to make an order in a case if, in their opinion, the issue would be more conveniently determined by the High Court, saving certain rights of the High Court to send it back to the justices for determination. At one time I thought that, perhaps, the simplest solution would be for us to exercise that discretion, for we are entitled to make any decision or order, or draw any inference, which the justices could make or draw, but, unfortunately, that does not carry the matter any farther because the justices, though entitled to express that opinion, which is not appealable, cannot enforce the hearing of the matter by the High Court, nor can we. But it now appears, as the result of discussion, that the husband, on the one hand, is anxious, as soon as the three-years period expires next January 23, to charge his wife in the High Court with desertion, and, on the other hand, the wife appears to be equally eager to bring her complaint of wilful neglect to provide reasonable maintenance in the High Court under the Matrimonial Causes Act, 1950, s. 23. That being so, even though we sent the case back to the only tribunal whom we have power to order to re-hear it, namely, a fresh panel of the justices for the Edmonton petty sessional division, as soon as they became apprised of the immediate likelihood of the issue being raised in the High Court in one form or another they would naturally adjourn the case to avoid the expense of a further hearing before them of a matter which was about to be litigated in the High Court.

DAVIES, J.: I entirely agree. The first two grounds in the wife's notice of appeal are as follows:—(i) That there was no evidence on which the justices could find that the wife had without reasonable cause left the matrimonial home, and (ii) that the decision of the justices was against the weight of the evidence. With regard to those two grounds of appeal it is, in my opinion, sufficient to say that, on any sort of reading of the full note which has been before us of the evidence given before the justices, it is impossible for any appellate court to say that the decision was against the weight of the evidence or that it was one at which on the evidence the justices could not reasonably and properly arrive.

It, therefore, becomes necessary to examine whether or not there is any substance in the contention that at the hearing before the justices the husband was estopped by the decision of the High Court from contending that he had not deserted his wife. The principle applying to such cases, about which much has been said and more written, is set out in two passages in *HALSBURY'S LAWS OF ENGLAND*, Hailsham ed., vol. 13. It is sufficient, I think, to quote only two sentences. The first is p. 409, para. 464:

"A party is precluded from contending the contrary of any precise point which, having been once distinctly put in issue, has been solemnly found against him."

The second is (*ibid.*, p. 421, para. 474):

"It is a fundamental rule that a judgment is not conclusive as to anything but the point decided, nor of any matter which came collaterally in question, or of any matter incidentally cognisable . . ."

We, therefore, have to consider what was in issue before the learned commissioner, and whether his opinion—for in the circumstances it was, in my judgment, no more than an opinion—that the wife was not guilty of desertion comes within the definition which I have quoted. As I understand the case before the learned commissioner, in the events that happened the only issue before him was: Aye or No, had the wife been guilty of cruelty? If the answer had been "Yes", then, of course, condonation, revival and other matters would have been issues in the case. The learned commissioner found, however, that the charge of cruelty had not been made out. That was an end of the case. As my Lord has said, nobody could dream of suggesting that the observations he thought proper to go on to make thereafter were wrong or should not have been made, but, so far as the issues in the case and any question of estoppel by *res judicata* are concerned, those observations were obiter, and, in my opinion, no sort of estoppel can arise from them. In my judgment, therefore, on this ground the appeal also fails.

With regard to the further matters raised in the notice of appeal, we have here two courts of competent jurisdiction—the High Court, on the one hand, and the Edmonton justices, on the other hand—having come on substantially the same questions of fact—I avoid the word "issues"—and on the evidence of, at any rate, some of the same witnesses, to diametrically opposite conclusions. That is a situation that, if it can be avoided, ought not to be allowed to persist. The crux of the whole case, as it seems to me, is that when the justices were asked to hear this summons, they were put into an impossible and intolerable position because they did not have placed before them for their consideration the vital matters which had been decided by Mr. Commissioner BLANCO WHITE. In view of the fact that none of the information which we now have was before them, the hearing was, in my judgment, most unsatisfactory, and their adjudication, owing to no fault of their own, ought not to be allowed to stand. I, therefore, agree with the order proposed by my Lord, and I should think that if and when this case comes before the justices again, they will almost certainly take the view that it is a case for the application of their discretionary powers under the Summary Jurisdiction (Married Women) Act, 1895, s. 10.

Appeal allowed.

Solicitors: *Asher Fishman & Co.* (for the wife); *Nash & Co.* (for the husband).

G.F.L.B.

QUEEN'S BENCH DIVISION

(UPJOHN, J., SITTING AS VACATION JUDGE)

Aug. 28, 1952

REG. v. BATH LICENSING JUSTICES & ANOTHER; *Ex parte* CHITTENDEN*Licensing—Occasional licence—Four consecutive periods of three days each—**Events at festival continuing for two months—Public dances and entertainments in public gardens—Revenue Act, 1862 (25 and 26 Vict., c. 22), s. 13—Licensing (Consolidation) Act, 1910 (10 Edw. 8 and 1 Geo. 6, c. 24), s. 64 (1), (2) and (4).*

On Aug. 12, 1952, the respondent applied for the grant of four occasional licences, for four consecutive periods of three days each, for the sale of intoxicating liquor in public gardens during a city festival which lasted two months. The four licences covered the period from Aug. 18 to Aug. 30, excluding Sunday, Aug. 24, and were for the occasions of public dances, illuminations and entertainments in the gardens. The justices granted the four licences. On motion for certiorari to quash the justices' orders,

HELD, that under s. 64 (1) of the Licensing (Consolidation) Act, 1910, justices were entitled to consent to a series of occasional licences for consecutive periods of three days each if they considered that the licences were "conducive to public convenience, comfort and order" within the meaning of s. 13 of the Revenue Act, 1862, and were otherwise proper, and that it was not necessary that an occasional licence should be for a separate and independent occasion only, or that there must be a lapse of at least one day between the periods for which two successive occasional licences could be granted. The justices were, therefore, entitled to grant the occasional licences which had been granted in the present case.

MOTION for orders of certiorari.

On July 18, 1952, the respondent, Charles Green, obtained the consent of the Bath licensing justices to the grant to him by the Commissioners of Customs and Excise of five occasional licences to sell intoxicating liquors from 8 p.m. to 11 p.m. in a marquee at Sydney Gardens, Bath, in connection with the Festival of Bath which was to be held there during August and September, 1952. Each of these licences was for a period of three days or less, but, in fact, they covered every day from Aug. 2 to Aug. 16, except Sunday, Aug. 3 and Sunday, Aug. 10. The applicant, Robert John Chittenden, a member of the City of Bath Licensed Victuallers' Protection Association, and acting on their behalf, had opposed the grant of these licences, but, as he did not move in time, there was no application before the court for certiorari to quash the orders of July 18. On Aug. 12 the respondent obtained the consent of the justices to the grant to him of four occasional licences to sell intoxicating liquors at Sydney Gardens from 8 p.m. to 10.30 p.m., the licences being (i) for Aug. 18, 19 and 20; (ii) for Aug. 21, 22 and 23; (iii) for Aug. 25, 26 and 27; and (iv) for Aug. 28, 29 and 30. All nine occasional licences granted to the respondent were identical in form and were for the occasion of public open-air dances, illuminations and entertainments, and the respondent intended to apply for similar licences for September. The applicant moved for an order of certiorari to quash the orders of Aug. 12 on the grounds, *inter alia*, (a) that there had to be a lapse of, at least, one day between the periods for which successive occasional licences could be granted, and (b) that a period of two months could not be regarded as an "occasion" within the meaning of the Revenue Act, 1862, s. 13, and the Licensing (Consolidation) Act, 1910, s. 64.

S. H. Lamb for the applicant.

Wingate-Saul for the respondent, Green.

The justices did not appear.

UPJOHN, J., stated the facts and continued: The sole question which I have to consider is whether the justices had jurisdiction to give their consent to the grant by the Commissioners of Customs and Excise of these occasional licences. That must depend primarily on the Licensing (Consolidation) Act, 1910, it being in pursuance of s. 64 of that Act that the justices gave their consent to the issue of the licences.

Section 64 (1) reads:

"An occasional licence shall not be granted except with the consent of a petty sessional court, and unless twenty-four hours at least before applying for that consent the applicant has served on the superintendent of police for the district notice of his intention to apply for the consent, setting out his name and address, the place and occasion in respect of which the licence is required, the period for which the licence is to be in force, and the hours to be specified in the consent of the justices."

I need not read the proviso. Section 64 (2) reads:

"The consent required by this section shall be substituted for the consent mentioned in s. 13 of the Revenue Act, 1862, s. 20 of the Revenue Act, 1863, s. 5 of the Revenue Act, 1864, and s. 19 of the Licensing Act, 1874."

Section 64 (4) is important:

"For the purposes of this Act an 'occasional licence' is a licence for the sale of intoxicating liquor granted under the authority of the Commissioners of Customs and Excise in pursuance of s. 13 of the Revenue Act, 1862, s. 20 of the Revenue Act, 1863, and s. 5 of the Revenue Act, 1864."

It will be convenient to consider those Acts to which reference is made in s. 64 of the Act of 1910. The Revenue Act, 1862, s. 13, reads:

"It shall be lawful for the [Commissioners of Customs and Excise], whenever they shall consider it conducive to public convenience, comfort, and order, and with the consents in writing of two justices of the peace usually acting at the petty sessions for the petty sessional division within which the place of sale is situate, to authorise any officer of [customs and excise] to grant to any person who shall be duly authorised to keep a common inn, alehouse, or victualling house, and who shall have taken out the proper excise licences to sell therein beer, spirits, wine, or tobacco, an occasional licence under this Act empowering him to sell the like articles for which he shall have taken out such licences as aforesaid at any such other place, and for and during such space or period of time, not exceeding three consecutive days at any one time, as the said commissioners shall approve, and as shall be specified in such occasional licence; and any person who shall have taken out such occasional licence shall not be liable to any penalty or forfeiture whatever by reason or on account of his selling the articles mentioned in the said licence during the time and at the place specified therein . . ."

The respondent had the proper excise licences, within the meaning of the section. The section plainly gives power to the Commissioners of Customs and Excise, with the consent of the petty sessional court, to grant an occasional licence whenever they consider it conducive to public convenience, comfort and order, provided it is not for a space or period exceeding three consecutive days at any one time.

In the following year the Revenue Act, 1863, was passed, and s. 19 thereof reads:

"In lieu of the duty now chargeable on a victualler's occasional licence, specified in sched. (B.) of [the Act of 1862] there shall be charged and paid the following duty; (that is to say,) for and upon every occasional licence to be granted to any person who shall be duly authorised to keep a common inn, alehouse, or victualling house, and licensed to sell therein beer, spirits, wine, or tobacco, to sell the like articles for which he shall be so licensed at any such other place, and for and during such space or period of time not exceeding six days as shall be specified in such occasional licence, the sum of 2s. 6d. for every day so specified as aforesaid for which the same shall be granted: Provided always, that when any person shall have taken out such an occasional licence for six successive days, and shall desire to take out another occasional licence for a time in immediate succession, or only separated by the intervention of Sundays and holidays, then the duty chargeable for every licence after the first, and for any number of days not exceeding six, shall not exceed 10s."

The curious feature about that section is that it refers to an occasional licence for a "space or period of time not exceeding six days", although s. 13 of the Act of 1862, which had not been expressly repealed or amended, clearly stated that the occasional licence was to be for a period not exceeding three days, and this was reiterated in sched. (B.) to the Act of 1862 [which was repealed by the Inland Revenue Act, 1880, s. 49 and sched. II].

The Revenue (No. 1) Act, 1864, s. 5, provided for the grant by the Commissioners of Customs and Excise of another type of licence which did not require the consent of the justices to its issue. There, again, the licences were to be for a period "not exceeding three consecutive days at any one time".

Section 19 of the Act of 1863 was repealed by the Finance (1909-10) Act, 1910, s. 96 (1), and sched. VI. It may also be noted that s. 320 and sched. XII of the Customs and Excise Act, 1952, which received the Royal Assent on Aug. 1, 1952, but does not come into force until Jan. 1, 1953, repeal, *inter alia*, s. 13 of the Act of 1862 and s. 19 and s. 20 of the Act of 1863. By s. 151 (1) of the Act of 1952 the Commissioners of Customs and Excise may grant an occasional licence for a period not exceeding in Great Britain three weeks or in Northern Ireland three days at one time.

Counsel for the applicant contends that, having regard to s. 13 of the Revenue Act, 1862, the justices cannot give their consent to the grant of a licence for more than three consecutive days at any one time, and they cannot avoid the section by employing the method which they have employed, *viz.*, of giving their consent to the grant of a series of three-day licences which cover the whole of August, which process, unless my judgment is against them, they are proposing to repeat throughout September. He further submits that there must be, at least, one day between the periods for which successive licences can be granted and that the justices have evaded s. 64 of the Licensing (Consolidation) Act, 1910, by, in effect, consenting to the grant of a licence for the whole of August. The second branch of his argument is that each of the licences is described as an "occasional licence", and that the circumstances in which each of the licences is granted cannot be described as an "occasion". He contends that, as the Festival of Bath was to last for two months, an application should have been made for a term licence under s. 14 (2) of the Licensing (Consolidation) Act, 1910, it being wholly outside the ambit of s. 13 of the Act of 1862 or s. 64 of the Act of 1910 to suppose that Parliament ever intended that a period such as a festival of two

months was to be considered as an "occasion". He pointed out that an "occasion" meant something of a temporary character and not something that went on week after week. He contended that there could be a series of separate occasions or separate events during the festival, e.g., a dance on one night or some show on another night, which could be the subject of the grant of an occasional licence, but that an occasional licence could not be granted for a period extending *de die in diem* over the whole period of two months, and that one could not break up what was really one whole occasion, which was outside the ambit of these Acts because it lasted for two months, into a series of artificial occasions of three days each.

The argument for the respondent was that s. 19 of the Act of 1863, which referred to an occasional licence of six days, impliedly repealed, not the whole of s. 13 of the Act of 1862, but that part of it which refers to a period not exceeding three days, and that, reading the Act of 1862 and the Act of 1863 together, there was no limitation on the time for which an occasional licence could be granted under s. 13 of the Act of 1862, and, therefore, under s. 64 of the Licensing (Consolidation) Act, 1910. He contended that it was within the jurisdiction of the justices to give their consent to the grant of one licence for the whole of this period of two months (August and September), and that the fact that they have thought fit to split up the period and give their consent to the grant of a series of (if they are successful) some eighteen occasional licences, does not invalidate the consents which they have given and which they are proposing to give. It is curious that s. 13 of the Act of 1862 and s. 19 of the Act of 1863 should be in these inconsistent terms, but I should hesitate long before I found that s. 19 of the Act of 1863 impliedly repealed the relevant provisions of s. 13 of the Act of 1862. However, I do not think it necessary to come to any conclusion on that matter, because the licences which were granted were all licences for three days and, therefore, were within s. 13 of the Act of 1862, and, consequently, of s. 64 of the Licensing (Consolidation) Act, 1910.

The real point, in my judgment, is this: Can this method of consenting to the grant of licences by the Commissioners of Customs and Excise be properly exercised having regard to the terms of s. 13 of the Act of 1862? In other words: In the circumstances of this case can these periods of three days each be considered proper periods for the grant of occasional licences? The only relevant authority which was cited to me on that point is *Chandler v. Emerton JJ.* (1), in which applications were made to justices for occasional licences authorising the applicant to sell intoxicating liquors at dances at a hall on thirteen nights—four Tuesdays, four Thursdays and five Saturdays—in one calendar month. It may be material to note that all the Tuesday dances were promoted by one person, all the Thursday dances by another person, and all the Saturday dances by a third person. The justices refused to grant the applications on the ground that they had no jurisdiction to do so, considering that the word "occasional" constituted a complete bar to the grant of applications made regularly. CHARLES, J., delivering the judgment of the Divisional Court, said:

"The justices . . . had undoubted jurisdiction, if they gave consideration to the matter, to refuse, if they thought for some good reason that the occasional licences ought not to be granted. They might think that the occasions were too frequent, perhaps. They might think that the occasions were not proper. There are numerous reasons whereby an authority can exercise its undoubted jurisdiction. Unfortunately, here they did something quite different. They said: 'We being of the opinion that the contentions

of the appellant were wrong and that on the facts proved and admitted before us we had no jurisdiction to grant the said applications considering the word "occasional" constituted a complete bar to the grant of applications made regularly and accordingly refused them.' That is to say, it is no longer a question of discretion, because, if the word 'occasional' constitutes a complete bar to them, they have no business to consider whether they will grant a licence to the same man once or twice or thrice. The word 'occasional' is a complete bar to their jurisdiction. We are quite clear that, whatever may be the rights and wrongs of this matter, and whatever may be the direction in which the justices will find it proper to exercise their discretion in these matters, when we are asked whether they were right in law and were acting within their jurisdiction in refusing the applications on the sole ground that the word 'occasional' prevented them from so doing, the answer of this court is in the negative . . . "

That authority, therefore, establishes that the fact that applications are made for the grant of occasional licences for regular periods is not by itself a complete bar, but, as counsel for the applicant rightly pointed out, it does not carry the matter any further.

From the affidavit of the justices, which was sworn by Mr. Robert North Green-Armytage, the chairman of the bench of justices who formed the court on Aug. 12, it appears that they gave most careful consideration to the whole of this matter. They said:

"We were of opinion that the events to be provided by the city council in the Sydney Gardens were sufficiently different from the normal use of the gardens to justify our regarding each day referred to in the applications as an 'occasion'—something unusual, illuminations, open-air dancing, fireworks, and so on, would be available to the public which would not be there on a normal day or, indeed, at any time, except for some three hours at night, and the sale of intoxicants, with other refreshments, would be merely ancillary to these matters."

They went on to say:

"We found more difficulty in bringing the proposed licences within the adjective 'occasional', which we related not to the nature of the occasion, but to the regularity of its occurrence, and we were conscious of the danger of permitting a number of occasional licences to develop into practically a permanent licence. We would not have been disposed to consent at one time to the grant of occasional licences covering the whole period to the end of September, as we felt it desirable to retain some control in the hands of the justices in case the events provided ceased to be an 'occasion' or the facilities for the supply of intoxicants proved unnecessary, or gave rise to legitimate complaints."

Those, I think, are two very important passages in the reasons given by the justices.

Before expressing my judgment on the major question, it may be convenient to deal with the submission of counsel for the applicant that there must be a lapse of at least one day between the periods for which two successive occasional licences can be granted. I see nothing in the Acts which makes that necessary, and that view is fortified by the fact that s. 19 of the Act of 1863 contemplated

that a person who has taken out an occasional licence for six successive days might apply for

" . . . another occasional licence for a time in immediate succession, or only separated by the intervention of Sundays and holidays . . . "

I see no objection to a grant of immediately successive occasional licences under s. 64 of the Licensing (Consolidation) Act, 1910.

That, however, does not dispose of the applicant's main point, viz., that a period of two months cannot be regarded as an "occasion" for the purpose of s. 64 of the Act of 1910 and s. 13 of the Act of 1862, and that such a period cannot be broken down into a series of artificial occasions so as to evade the Acts. In my opinion, however, the vital words in s. 13 of the Act of 1862 are these:

"It shall be lawful for the [Commissioners of Customs and Excise], whenever they shall consider it conducive to public convenience, comfort, and order, and with the consents in writing of two justices of the peace . . . to grant . . . an occasional licence . . . "

What has to be considered in granting a licence is whether it is conducive to public convenience, comfort and order, and it must not exceed three days. Under s. 13 it is for the Commissioners of Customs and Excise to consider the question of public convenience, comfort and order, but, of course, it is also one of the matters with which the justices may deal. As appears from their affidavit, the justices considered this matter very carefully and, in my judgment, when it is for public convenience, comfort and order, and otherwise proper—and no suggestion against the propriety of these licences has been made—there is nothing whatever to prevent justices from giving their consent to the grant of a series of licences, provided that each licence is for a period not exceeding three consecutive days. Although the word "occasional", which occurs throughout licensing law but is nowhere defined, has, apparently, given rise to the view that the grant of an occasional licence must be for a separate and independent occasion only, that, in my view, is not its normal meaning, and I have been referred to no authority to show that the use of the adjective "occasional" connotes that necessity before the justices can give consent. They have to consider the matters set out in s. 13 of the Act of 1862 and all other matters properly raised before them. If they come to the bona fide conclusion that the circumstances of the case are appropriate to the grant of an occasional licence, although one of a series, as in this case, in my judgment, there is nothing to prevent them giving their consent. I dismiss the application with costs.

Application dismissed.

Solicitors: *J. E. Lickfold & Sons*, agents for *Tisley, Long & Co.*, Bath (for the applicant); *Sharpe, Prichard & Co.*, agents for *J. E. Dixon*, town clerk, Bath (for the respondent).

T.R.F.B.

COURT OF CRIMINAL APPEAL

(LORD GODDARD, C.J., FINNEMORE AND MCNAIR, JJ.)

October 13, 1952

REG. v. PEARCE

Criminal Law—Sentence—Corrective training—"Offence punishable with imprisonment for . . . two years or more"—Attempt—Attempting to take and drive away motor vehicle without owner's consent—Maximum sentence for substantive offence twelve months' imprisonment—Criminal Justice Act, 1948 (11 and 12 Geo. 6, c. 58), s. 21 (1) (a).

Where the maximum term of imprisonment for an offence is limited by statute, although the attempt to commit it may technically be a common law misdemeanour, the sentence for the attempt should not be for a longer period than the maximum permissible for the full offence. Accordingly, a conviction of an attempt to take and drive away a motor car without the consent of the owner, the maximum punishment for the full offence being twelve months' imprisonment, is not a conviction "of an offence punishable with imprisonment for two years or more" within the meaning of s. 21 (1) (a) of the Criminal Justice Act, 1948, so as to qualify the offender for a sentence of corrective training.

Rez v. Morris (1950) 115 J.P. 5, explained.

REFERENCE by the Secretary of State under s. 19 (a) of the Criminal Appeal Act, 1907.

The appellant was convicted at the County of London Sessions of attempting to take and drive away a motor-car without the consent of the owner and was sentenced to three years' corrective training. He appealed against conviction only, and his appeal was dismissed. Subsequently, he petitioned the Home Secretary on the ground that he was not liable to a sentence of corrective training, and the Home Secretary referred the matter to the court.

No counsel appeared.

LORD GODDARD, C.J., delivered the following judgment of the court. The appellant was convicted at the County of London Sessions in March, 1951, of attempting to take and drive away a motor vehicle without the consent of the owner, contrary to s. 28 (1) of the Road Traffic Act, 1930, and was sentenced to three years' corrective training. He appealed against conviction, and the appeal was dismissed. An appeal by him against sentence was abandoned and never came before the court. Recently he petitioned the Home Secretary on the ground that in the circumstances he was not liable to be sentenced to corrective training, and the Home Secretary has referred the matter to the court.

On his conviction, two previous convictions were proved against the defendant, and it was also shown that he had been sent to Borstal on more than one occasion. The difficulty that arises is that under the Road Traffic Act, 1930, s. 28 (1) (b), the maximum term of imprisonment prescribed for taking and driving away a motor car without the consent of the owner is twelve months. In *Rez v. Morris* (1) this court held that, when a man is convicted of a common law misdemeanour, the court, in its discretion, can impose a fine or pass a sentence of imprisonment for any term which the court thinks right. As the appellant attempted to commit the offence in the present case, he was guilty of a common law misdemeanour, but it is not right, if a man is convicted only of an attempt to commit an offence, although technically that may be a common law misdemeanour and so he may be liable to a term of imprisonment at the discretion of the court, that he should

(1) 115 J.P. 5; [1950] 2 All E.R. 965; [1951] 1 K.B. 394.

be given a longer sentence for the attempt than he could have been given if he had committed the full offence. If the appellant had not only attempted to drive away this car, but had actually driven it away, the utmost sentence he could have received would have been twelve months' imprisonment, and he could not have been sent to corrective training because the offence of which he would have been convicted would not have been "punishable with imprisonment for a term of two years or more" within the Criminal Justice Act, 1948, s. 21 (1) (a).

In *Rex v. Morris* (1), which was a case where a man was indicted for conspiracy to smuggle goods and it was argued that the misdemeanour of smuggling was not punishable by a longer sentence than two years' imprisonment, it was shown that the smuggling had been going on for a long time and the conspiracy was one of the most dangerous description. We held, therefore, that HALLETT, J., was justified in passing a sentence of four years' imprisonment, but, in giving the judgment of the court, I said:

"... if the evidence showed that the defendant had been concerned in only one offence it would obviously be wrong to impose, on his conviction of conspiracy, a longer sentence than he could have received if he had been merely convicted of the substantive offence."

A fortiori, that applies to an attempt, and if for the full offence Parliament has laid down a definite sentence, it is wrong, if a defendant is convicted of an attempt, to give a longer sentence than could have been given for the substantive offence.

As the whole case was referred to us by the Secretary of State, we can deal with it under s. 19 (a) of the Criminal Appeal Act, 1907, as if it were an appeal, and, accordingly, direct that the defendant be immediately discharged.

Order accordingly.

T.R.F.B.

(1) 115 J.P. 5; [1950] 2 All E.R. 965; [1951] 1 K.B. 394.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., FINNEMORE AND McNAIR, JJ.)

October 15, 1952

LANGMAN v. VALENTINE AND ANOTHER

Street Traffic—Using and permitting uninsured motor vehicle to be used on road—Learner being taught by instructor—Instructor, but not learner, insured—Use by learner covered by instructor's policy—Road Traffic Act, 1930 (20 and 21 Geo. 5, c. 43), s. 35 (1).

Street Traffic—Driving without licence—Learner being taught by instructor—Learner sitting in driving seat and using accelerator and footbrake—Instructor holding steering wheel and handbrake—Instructor and learner both "drivers"—Road Traffic Act, 1930 (20 and 21 Geo. 5, c. 43), s. 4 (1).

The second respondent was the owner of a motor car and was teaching the first respondent to drive on a public road. The first respondent sat in the driver's seat and had her foot in position to use, and did use, the accelerator and the footbrake. She held no driving licence and was not insured. The second respondent sat in the seat next to the driver's, had his left hand on the steering wheel and his right hand on the handbrake, and was able to steer, stop or start the car. He

held a driving licence and had a policy in respect of the user of the car while he was driving and also while any other person was driving with his permission, provided that such other person held or had held a driving licence and had not been disqualified. The first respondent was charged with having unlawfully driven the car on a road without a driving licence, contrary to s. 4 (1) of the Road Traffic Act, 1930, and with having unlawfully used the car while uninsured, contrary to s. 35 (1) of the Act. The second respondent was charged with aiding and abetting the first offence and with unlawfully permitting the use of the vehicle when uninsured. The justices were of opinion that the second respondent had sufficient control of the car to enable them to find that he was the driver of it and they dismissed all the informations.

HELD (i) both the respondents were "drivers" of the car, and, therefore, the first respondent had been guilty of driving on a road without a licence, and the case must be remitted to the justices with a direction to convict on that information;

(ii) as it had not been proved that the second respondent knew that the first respondent had no driving licence, he could not be convicted of aiding and abetting;

(iii) (McNAIR, J., dissenting) since, if an accident had happened when both respondents were driving and the second respondent had been sued, his insurance company would have been bound to grant him indemnity, there was a policy of insurance in force in respect of the user of the car at the material time although the first respondent was also driving, and the justices were right in dismissing the informations under s. 35 (1) against both respondents.

CASE STATED by Devon justices.

At a court of summary jurisdiction sitting at Plympton informations were preferred by the appellant, a police officer, charging the first respondent, Phyllis Lilian Valentine, with having on Mar. 9, 1952, at Plymstock unlawfully used a motor car on a public highway, there not being in force in relation to such user such a policy of insurance or such security in respect of third party risks as complied with the requirements of Part II of the Road Traffic Act, 1930, contrary to s. 35 (1) of the Act, and with having on the same day at Plymstock unlawfully driven a motor car on a road, she not being the holder of a licence, contrary to s. 4 (1) of the Act. Informations were also preferred by the appellant against the second respondent, Morgan, charging him with having, on Mar. 9, 1952, at Plymstock unlawfully permitted the first respondent to use a motor car on a road, there not being in force in relation to such user such a policy of insurance or such a security in respect of third party risks as complied with the requirements of Part II of the Road Traffic Act, 1930, contrary to s. 35 (1) of the Act, and with having on the same day unlawfully aided, abetted, counselled, and procured the first respondent unlawfully to drive a motor car without having a licence in force under s. 4 (1) of the Road Traffic Act, 1930, contrary to s. 5 (1) of the Summary Jurisdiction Act, 1848.

The informations were heard on Apr. 7, 1952, when the following facts were proved or admitted. The second respondent was the owner of a motor car and on Mar. 9, 1952, was teaching the first respondent to drive it on Billacombe Road, Plymstock. He held a licence to drive. The first respondent had no driving licence and had never held a driving licence. There was in force, in respect of the motor car, a policy of insurance, which covered the second respondent while he was driving and also while any other person was driving with his permission, provided that such other person held or had held a driving licence and had not been disqualified for holding such a licence. The first respondent was sitting in the driver's seat and was steering the motor car under the guidance of the second respondent. The second respondent was sitting in the seat next to that of the driver and had his left hand on the steering wheel and his right hand on the hand-brake. He was able to steer the car and to stop it or start it, the ignition switch being within his reach, and he had control of the handbrake. The first respondent had her foot in position to use, and did use, the accelerator and the footbrake.

The appellant contended that the first respondent was the driver of the car, and that the offences charged had been committed. The respondents contended that the second respondent was the driver of the car, and that no offences had been committed. The justices held that the respondents' contention was correct and that the second respondent had sufficient control of the car to enable them to find that he was the driver thereof. They, therefore, dismissed the informations.

F. H. Lawton for the appellant.

Baerlein for the respondents.

LORD GODDARD, C.J.: There is no question that the first respondent, by sitting in the driving seat and doing what she did, was at least a driver of the car, and, so far as the justices dismissed the summons against her for driving when she did not hold a licence, this case must go back to the justices with a direction to convict. It is important, and justices should remember and show by their decision that they recognise that it is important, that the provisions with regard to persons who are learning to drive motor vehicles should be rigidly complied with. The second respondent was charged with aiding and abetting, but as no evidence was given that he knew that she held no driving licence and as there is no finding about it we cannot reverse the decision of the justices on that.

On the difficult question whether the first respondent was driving while uninsured, the justices find that the second respondent was sitting in the passenger's seat and had his left hand on the steering wheel and his right hand on the handbrake. Then:

"He was able to steer the car, stop it or start it, the ignition switch being within his reach, and he had control of the handbrake. The first respondent had her foot in position to use, and did use, the accelerator and the footbrake."

On those facts the justices came to the conclusion that the second respondent

"had sufficient control of the car to enable us to find that he was the driver thereof."

I do not think the justices were justified in finding that he was *the* driver, but I think on those facts that they could find, as they no doubt intended to find, that he was a driver. I do not think it is impossible either in law or in fact to say that there can be two drivers at the same time, two people controlling the car. One may be controlling the starting and one may be controlling the stopping, and they may both be controlling the steering, though that may be rather a perilous thing to do. I do not think that the definition section of the Road Traffic Act, 1930, helps in this case. Section 121 (1) provides:

" 'Driver', where a separate person acts as steersman of a motor vehicle, includes that person as well as any other person engaged in the driving of the vehicle, and the expression 'drive' shall be construed accordingly."

That deals with steam-wagons and vehicles of that sort, where one person stokes the fire and controls the steam while another steers the wagon. In the present case I think we must take it that the justices meant to find that the second respondent was a driver of the car. If they meant that he was the sole driver of the car, I should disagree with them, but I think it must be taken that they thought he had sufficient control of the car to be reasonably called a driver. So far, I should agree, or at least should not disagree, with them though whether I should have found that myself is another matter. It follows that both the respondents were engaged in driving the car.

Counsel for the appellant argued that even in those circumstances an offence has been committed because there was no policy in force covering the user of the car by the first respondent, and he distinguished this case from several cases which have been before the court on the ground that those cases were master and servant cases. We held, for instance, that where a policy covered the use of a vehicle by a company's servant, subject to an exceptions clause excluding liability if the driver to the company's knowledge did not hold a driving licence, if the person who drove the vehicle was prosecuted for driving it without there being in force in relation to his user a policy of insurance, he could show that there was such a policy in force which covered his driving although it did not give any indemnity to him: *John T. Ellis, Ltd. v. Hinds* (1). If his servant committed a negligent act, the master would be liable because his servant was driving the vehicle, and if the master was sued there was the policy in force. Anybody who chose to sue the driver could recover damages against him and there would not be a policy in force indemnifying the driver, but there would be a policy in force covering the use of the car by the driver.

If an accident had happened when both respondents were driving, it seems to me that the injured person could have brought an action against the second respondent, and he would have been liable and his insurance company would have been bound to give him indemnity for the accident. It is true that the first respondent was also using the car, but there was in force at that time a policy which would cover the use of the car by the first respondent because the car was being driven by the second respondent. I agree it is a difficult point, and it is possible to take more than one view about it. I left this point expressly open in *Reay v. Young* (2) when I said:

"I am not here concerned to consider—it may arise in another case—whether or not the husband was, in fact, the driver of the car (i.e., whether he was controlling the driving so that he was the driver), because both respondents pleaded Guilty."

I have come to the conclusion that we cannot disturb the finding of the justices except on the point whether the first respondent was guilty of driving without a licence.

FINNEMORE, J.: I agree. The justices came to the conclusion that the second respondent was using such control over the car that at the time he was the driver. I think that the probability is that both he and the first respondent were jointly driving the car at the time. She had, according to the justices' finding, her foot in a position to use, and did use, the accelerator and the foot-brake. The second respondent had one hand on the handbrake and the other hand on the steering wheel, and he had the ignition switch within his reach and was able to steer the car, and stop it or start it. In those circumstances it seems to me that the justices were entitled to find that he was driving the car. The difficulty arises as to what is the position under s. 35 (1) of the Road Traffic Act, 1930, when two people were driving the car. One of those people, the second respondent, had a policy of insurance in the usual terms, and I think it must follow that, had anybody been injured by that car through bad driving, the second respondent would have been responsible because he was driving. He would have been entitled to claim indemnity under his policy, and, therefore, I think there was in force a policy in relation to the user of the vehicle by either person at that time. The mere fact that the first respondent had no policy and was not herself insured seems to me to be immaterial if in

(1) [1947] 1 All E.R. 337; [1947] K.B. 475.

(2) 113 J.P. 336; [1949] 1 All E.R. 1102.

fact the second respondent was driving simultaneously and he held a policy which was in force."

I note that in *Marsh v. Moores* (1) LYNSEY, J., expressed his opinion on a somewhat similar point. In that case the driver was sitting in the passenger seat beside the person he allowed to drive and was ready to operate the handbrake. It is not so strong a case as this, where the second respondent had one hand on the handbrake and the other on the steering wheel. LYNSEY, J., said:

"In these circumstances, it seems to me that he still remained the driver of the car . . ."

That was obiter, but a fortiori in this case where the second respondent had part of the control of the steering wheel and the handbrake. The justices were right in finding that the second respondent was driving this vehicle, and there was a policy of insurance which covered his user of the car. Accordingly, I agree with my Lord in both matters—that the justices must convict the first respondent on the information charging her with driving without a licence and that they were right in the conclusion to which they came on the other charge.

McNAIR, J.: I agree that this case must go back to the justices with directions to convict the first respondent on the charge relating to the licence, and I also agree that the charge against the second respondent of aiding and abetting must fail. As regards the charge against the first respondent under s. 35 (1) of the Road Traffic Act, 1930, I am prepared to accept, though I have some difficulty in doing so, the finding of the justices that the second respondent had sufficient control of the car to enable them to find that he was the driver, or at least, as my Lord has interpreted it, a driver, although the more natural finding would seem to me to be that the first respondent was the driver driving under instructions. But, accepting this finding of the justices, I am unable to agree that within the meaning of s. 35 (1) of the Act there was in relation to the user of the vehicle by the first respondent in force either a policy of insurance or a security in respect of third party risks. It seems to me that there were two different users, first, a user of the car by the first respondent, and, secondly, a user of the car by the second respondent. In relation to the user of the car by the second respondent, there was clearly a policy in force, but I cannot see that this policy can in any sense of the word be said to be a policy in relation to the user of the car by the first respondent when by its terms it says that it is not to apply when the car is being driven by a person who is not holding and has not held a driving licence. The words of s. 35 (1) of the Act are not "while the car is being driven by that person", but "in relation to the user of the vehicle by that person". I cannot find any evidence that there was in force in relation to the user of the car by the first respondent such a policy of insurance as is required by the Act. My brothers, however, have taken a different view, and I merely record my respectful disagreement.

Orders accordingly.

Solicitors: *Wontner & Sons*, agents for the prosecuting solicitor for the county of Devon (for the appellant); *Amery-Parkes & Co.*, agents for *Goodman & Emerson*, Plymouth (for the respondents).

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., FINNEMORE AND McNAIR, JJ.)

October 8, 14, 1952

HOLLAND v. PERRY

Motor Vehicle—Excise licence—Unlicensed vehicle—Minimum penalty—Reference to amount of annual duty—Right of defendant to prove portion of annual duty paid—Right of justices to mitigate penalty—Vehicles (Excise) Act, 1949 (12, 13 and 14 Geo. 6, c. 89), s. 15 (1) (b).

The penalty imposed by s. 15 (1) (b) of the Vehicles (Excise) Act, 1949, for using on a road a motor vehicle without there being a licence in force is *prima facie* to be calculated with reference to the annual duty, but it is open to a defendant to prove that part of the annual duty has been paid, so that only a portion of it still remains chargeable.

On Dec. 16, 1951, the respondent used on a public road a motor vehicle for which there was no licence in force. No evidence was given or adduced by the respondent to the effect that he had paid any part of the annual duty or that the vehicle had been used on any other day in 1951.

HELD, that the maximum penalty must be calculated with reference to the annual duty; under the section it was three times the amount of the duty; and under s. 78 of the Excise Management Act, 1827, the justices could not reduce the penalty to less than a quarter of that sum.

CASE STATED by Surrey justices.

At a court of summary jurisdiction sitting at Caterham on Mar. 31, 1952, the appellant, an officer of the Surrey County Council, preferred an information against the respondent, Dudley Thomas Perry, charging that he, on Dec. 16, 1951, did unlawfully use on a public road a motor vehicle for which a licence was not in force, contrary to the Vehicles (Excise) Act, 1949, s. 15 (1). It was proved or admitted that the vehicle was used on Dec. 16, 1951, and no evidence was given that it was used on any other day in 1951. The annual duty in respect of the vehicle was £30.

It was contended on behalf of the appellant that (a) by the Vehicles (Excise) Act, 1949, s. 15 (1), the penalty for an offence under that section should be either an excise penalty of £20 or an excise penalty equal to three times the amount of the duty chargeable in respect of the vehicle, whichever sum was the greater; (b) by s. 1 (b) of the Act the duty was to be paid annually; (c) by the Excise Management Act, 1827, s. 78, the justices had power to mitigate any excise penalty, but such mitigation should not reduce the penalty to less than one-fourth part thereof; (d) that for the purposes of s. 15 (1) of the Act the duty chargeable in respect of the vehicle was the annual duty, namely, £30, and the maximum penalty which the justices could impose was £90 and the minimum £22 10s. The respondent pleaded Guilty to the charge.

The justices were of the opinion that the maximum penalty they were empowered to impose by virtue of s. 15 (1) of the Act of 1949 was three times the amount of duty chargeable in respect of the vehicle for the last quarter of the year, namely, three times £8 5s., which amounted to £24 15s., and, in exercise of their power to mitigate under the Act of 1827, they imposed a penalty of £12.

J. P. Ashworth for the appellant.

The respondent did not appear.

Cur. adv. vult.

Oct. 14. LORD GODDARD, C.J., read the following judgment of the court. This is a Special Case stated by justices for the county of Surrey before whom the respondent was charged with unlawfully using on a public road a certain motor vehicle for which a licence was not in force, contrary to the Vehicles (Excise)

Act, 1949, s. 15 (1). The respondent pleaded Guilty and admitted a previous conviction for a similar offence by him and the justices imposed a penalty of £12. The question that arises is whether the justices had any power to impose a penalty of less than £22 10s. in the circumstances which hereafter appear. The vehicle was, in fact, a goods vehicle, and the annual duty imposed by the Act was £30. By s. 15 (1) of the Act a person using an unlicensed vehicle on a public road is liable to (a) an excise penalty of £20 or (b) an excise penalty equal to three times the amount of the duty chargeable in respect of the vehicle, whichever is the greater. As this was a second offence the justices had no power to mitigate the fine under s. 4 of the Summary Jurisdiction Act, 1879, but by s. 78 of the Excise Management Act, 1827, they have a general power to mitigate provided they do not reduce the penalty to less than a quarter. It was contended for the appellant that the maximum penalty was £90, and, therefore, that the least fine that could be imposed was one of £22 10s.

The question we have to decide is what is the meaning of the words in s. 15 (1) "the amount of the duty chargeable in respect of the vehicle", and this involves a consideration of two or three sections in the Act. By s. 1 it is provided that, subject to the provisions of the Act, there shall be charged in respect of mechanically propelled vehicles used on public roads the duties of excise provided by the next five following sections and the duty so chargeable shall be paid annually on a licence to be taken out by the person keeping the vehicle. Section 5 which deals with goods vehicles provides that the duty chargeable in respect of a goods vehicle shall be that set out in sched. IV to the Act and the duties therein set out are all annual duties. By s. 11 it is provided that, notwithstanding anything in s. 1 (b), a licence may be taken out for such periods of the year and on payment of such rates as the Minister may by order made by statutory instrument prescribe. We need not set out the proviso to that section or go into all the provisions of the statutory instrument which has been made in pursuance of that section. It is enough to say that a licence may be taken out for any period of the year commencing before Oct. 1, and expiring on Dec. 31, for any quarterly period or for any period less than a quarterly period expiring on the last day of any quarterly period and the provisions are such that if a licence is taken out to be current only during the last month of a quarter a proportion of the quarterly payment will only be required.

The evidence in this case showed that the vehicle was used on Dec. 16 and no evidence was given that it was used on any other day in that year, and, accordingly, the justices were of opinion that the maximum penalty was three times the amount of duty chargeable in respect of the particular vehicle for the last quarter of the year. In fact, if the view which they took of the section is right it would have been rather less, since, if they were entitled to consider that this vehicle was only used in the month of December, the duty chargeable would have been, had it been licensed for that month only, less than if it had been licensed for the whole quarter. No evidence at all was given by the respondent, so the only evidence before the justices was that the vehicle was being used on one day and had no licence.

In our opinion, the words "the amount of the duty chargeable in respect of the vehicle" in s. 15 must *prima facie* apply to the duty charged by s. 1 of the Act and must also refer to the duty chargeable as specified in sched. IV as provided by s. 5. If, therefore, a person is found driving a vehicle which is unlicensed, *prima facie* he is liable to a penalty of three times the annual excise duty, but, if he has taken advantage of s. 11 and taken out a licence for part of the year and paid the duty for a part of the year, it would follow that the duty chargeable

in respect of the vehicle would only be so much of the annual duty as had not already been paid. Thus, if a man licenses his car for the first two quarters of a year and uses it during the second half of that year without taking out a further licence, he could, in our opinion, show that the amount of the duty chargeable was only the annual sum less the amount already paid by him. It is true that this would require him to give evidence that he had paid duty and would not require the excise authorities as prosecutors to prove what was the duty owing, but it is possible in a criminal case as in a civil case for the onus to shift. He is found using an unlicensed car. He is, therefore, liable to a penalty equal to three times the amount of the duty chargeable. The duty chargeable in the Act is a duty for the whole year. If, therefore, he has paid duty for part of the year, it is for him to show it. As the respondent in this case gave no evidence, we think he was liable to pay the penalty of three times the amount of the full duty, that is to say £90, and, therefore, the justices were bound to impose a penalty of at least a quarter of that sum, namely, £22 10s. It is abundantly clear that there is neither hardship nor injustice in this result as, if the respondent had paid duty during the previous part of the year, he, no doubt, would have given evidence to that effect.

The result at which we have arrived will also apply in the case of a car acquired by a purchaser during a year. If, for instance, during the year he bought a car which had no licence and used it, when prosecuted he could show the date when he acquired the car and the court would then be able to find by reference to s. 11 and the statutory instrument what the duty payable on the car would have been had it been licensed. It would not, in our opinion, be open to a defendant in such circumstances to say: "Well, if I had licensed it I should only have licensed it for a short period, such as a quarter". If he had not taken advantage of the provisions of s. 11, his intention to do so, even if the justices thought it was a genuine intention, would not avail him.

We decide that the penalty imposed by s. 15 is *prima facie* to be calculated by reference to the annual duty, but that it is open in any case to a defendant to show that in fact part of that annual duty has been paid so that only a portion of the duty remains chargeable. The case must go back to the justices with an intimation that they must impose a penalty of not less than £22 10s. While we are differing from them we fully appreciate the reasons for their decision and recognise the clarity with which this case is stated.

Case remitted.

Solicitor: *Treasury Solicitor* (for the appellant).

T.R.F.B.

PROBATE, DIVORCE AND ADMIRALTY DIVISION

(LORD MERRIMAN, P., AND DAVIES, J.),

Oct. 13, 14, 1952

ENGLAND v. ENGLAND

Divorce — Adultery — Evidence — Presumption — Inclination and opportunity —

Summary Jurisdiction (Married Women) Act, 1895 (58 and 59 Vict., c. 39), s. 7.

There is no rule of law that evidence of the conjunction of strong inclination with opportunity raises an irrebuttable presumption that adultery has been committed.

After November, 1951, the wife, who was separated from the husband, and M. became attracted to each other. M. was a constant visitor to the room occupied by the wife, and on Apr. 20, 1952, he spent the night with her there because, the parties stated in evidence, she was ill. They admitted having discussed committing adultery, but said that they had decided not to do so, and they denied having committed adultery on Apr. 20, or at any other time. On a summons by the husband, under s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, to discharge, on the ground of the wife's adultery, a maintenance order made against him on July 31, 1946,

HELD: although there was sufficient evidence to establish adultery, that evidence could be contradicted, e.g., by the sworn testimony of the wife and M., and in the circumstances the summons would be dismissed.

APPEAL by the husband against the dismissal by the justices for the Gore petty sessional division of Middlesex, on June 11, 1952, of his summons claiming, under the Summary Jurisdiction (Married Women) Act, 1895, s. 7, a discharge, on the ground of the wife's adultery, of an order made against him on July 31, 1946, on the ground of his desertion.

It was admitted by the wife and one Moorcroft that from about November, 1951, the latter was a frequent visitor to the wife at the room which she occupied, and that on Apr. 20, 1952, he had spent the night with her in her room because she was ill. He had not got into bed with her, but had slept on two chairs. They further admitted that they were very fond of each other and that on another occasion they had discussed whether they should commit adultery, but, being very anxious to marry if they could be divorced from their respective spouses, they decided that it would spoil their future if they tainted their relationship by committing adultery. The justices dismissed the summons and the husband appealed.

He contended that the admitted inclination and opportunity to commit adultery raised an irrebuttable presumption that adultery had been committed; alternatively, that the wife and Moorcroft were estopped from giving evidence in denial; alternatively, that the wife must be deemed to have committed "an act of adultery" within the meaning of s. 7 of the Act of 1895.

Seuffert for the husband.

C. D. E. Rich for the wife.

LORD MERRIMAN, P.: This is a husband's appeal from the dismissal by the justices for the Gore petty sessional division of Middlesex, sitting at Hendon, of his summons claiming the discharge of an order made against him on July 31, 1946, on the ground of desertion. The application was based on the Summary Jurisdiction (Married Women) Act, 1895, s. 7, the last sentence of which reads:

"If any married woman upon whose application an order shall have been made under this Act . . . shall commit an act of adultery, such order shall upon proof thereof be discharged".

It is said that it was proved that the wife had committed an act of adultery, and that the finding of the justices to the contrary cannot stand.

[His Lordship stated the facts and continued:] I approach this case not only with regard to the facts of the night of Apr. 20, but adding to them the admission, about which there was no doubt, that the wife and Moorcroft were frequently in each other's company in the house in which she had a room. In other words, the evidence that they were alone together in that room throughout the whole of that night is only an instance, albeit a very strong example, of a combination of inclination and opportunity which manifestly existed on many other occasions than that about which the evidence was given. The justices found that, although the wife and this man were exceedingly indiscreet on Apr. 20, 1952, in that they spent the night together, they did not commit adultery. This case was argued, not on the indisputable proposition that, uncontradicted, there was ample evidence to support a conclusion of adultery, but on the basis that it could not be contradicted, and that the admitted fact that these people were in that room alone together during the night of Apr. 20, coupled with the admitted fact that they were attracted by each other, raised what was at one moment called an irrebuttable presumption that they had committed adultery, or, alternatively, that they were estopped from giving evidence that they had not committed adultery, or that they must be deemed within s. 7 (which does not say anything about "deeming") to have committed an act of adultery, and, therefore, that this decision cannot stand.

The argument was based on the decision of the Court of Appeal in *Woolf v. Woolf* (1), and it is no doubt the fact that there are some isolated passages, particularly in the judgment of LORD HANWORTH, M.R., which support the view that from the evidence adduced about the events of the night of Apr. 20 "adultery must be inferred", to use one phrase which occurs ([1931] P. 144), but, in my opinion, it is vital to bear in mind what were the circumstances of that case. It was a decision of LORD MERRIVALE, P., at a time when the class of undefended divorce suit which depended on evidence of a single night at a hotel with a woman unknown was very prevalent. No doubt, my predecessor expressed himself very strongly about the unsatisfactory nature of that class of case, but it is right to say that one has only to look back at some of the older reports to see that similar opinions are to be found in earlier cases. The point which was attracting attention was not only whether adultery had or had not been committed, but whether the circumstances suggested that the suit was tainted by either collusion or connivance. The significant fact about *Woolf v. Woolf* (1) was that the learned President had expressed himself as not being in any doubt on that matter, but as completely satisfied of the good faith of the petitioner. Therefore, no question of collusion or connivance in connection with the visit of the husband to a hotel arose. Moreover, at an earlier stage of the case *HILL, J.*, had directed inquiries by the King's Proctor because the woman with whom adultery was alleged was unnamed. The King's Proctor reported that he was unable to throw any further light on the matter, and it was after these inquiries that the learned President said that he saw no reason whatever to assume that the petitioner had not acted in good faith. He was inclined to hold that adultery had not been committed, and suggested that, the woman being unnamed, some relative of the husband might have been masquerading as his paramour so that he could obtain a divorce. It was with reference to such circumstances that the Court of Appeal expressed themselves, and *ROMER, L.J.*, after saying that the husband refused to disclose the woman's name, said (*ibid.*, 146):

(1) [1931] P. 134.

"What possible difference it would have made had the name been disclosed I am at a loss to see; because the only thing that the court would have been able to discover from a disclosure of the name would have been that the lady was not, as the learned President suggests she might possibly have been, some near relative of the respondent. In my opinion, that possibility can be entirely ruled out; it is incredible, in the circumstances, that the lady was an aunt or a sister or any like near relation of the respondent."

In the absence of any defence and of any attempt to impose a fraud on the court the Court of Appeal said that the inference of adultery ought to have been drawn. That seems to me to be a very different thing from saying that where a case is contested parties who deny adultery are not allowed to be heard to say so, that they are estopped from denying it, that the presumption is irrebuttable, and that their evidence to the contrary is not to be listened to in spite of the fact that in one sense, on their own admission, their evidence, if believed, deprives both of them of the possibility that their respective spouses might make use of the circumstances to obtain divorces, which would enable them to bring their hopes of marriage to fruition.

I decline to hold that there is any rule of law that the conjunction of strong inclination with evidence of opportunity leads to an irrebuttable presumption that adultery has been committed. That it affords very strong prima facie evidence is indisputable, but that is quite another thing. I am reluctant to drag in my own experience as a judge—particularly as nobody has been able to cite any reported case—but I should say from my own recollection that I have known several cases where, although the circumstantial evidence from which an inference of adultery has been sought to be drawn has been very strong—at least as strong as in this case—nevertheless, one has been persuaded that the evidence of the parties denying that adultery had been committed must be accepted. I cannot believe that there is any law which obliges a court to decide in a contested case, where there is strong prima facie evidence on the one side, and, maybe, strong circumstantial evidence supporting a denial on the other side, that, contrary to its own belief, adultery has been committed. I put to counsel, by way of testing how far this proposition went, the question whether, if a denial in the same terms as in this case was supported by the circumstantial evidence, supposing the alleged paramour to be a woman, that she was proved by medical evidence which left no doubt to be *virgo intacta*, it could still be said that the fact that the parties had spent a night alone in a room was not susceptible of an innocent explanation.

We were referred to the decision of the Court of Appeal in *Gower v. Gower* (1). I am not going to discuss the question of the burden of proof, for that, I think, has already been disposed of by the House of Lords in *Preston-Jones v. Preston-Jones* (2). It is not easy from the report to follow exactly what happened, but an issue had been directed whether or not adultery had been committed, and that was tried by BARNARD, J., who found that it had not. I will read the opening sentences of BUCKNILL, L.J.'s judgment:

"The learned judge came to the conclusion that adultery was not made out, mainly on the ground that there was not a scrap of evidence of any inclination. I venture to think that the learned judge has misdirected himself there. The vital question is: Where were these people sleeping during the time that they were together? If the evidence points almost

(1) 114 J.P. 221; [1950] 1 All E.R. 804.

(2) [1951] 1 All E.R. 124; [1951] A.C. 391.

irresistibly to the fact that they were sleeping in the same room, one does not want any further evidence than that."

I pause there. If I may put my own paraphrase, that is simply saying, as has been said over and over again in this court, that the very same facts may be evidence both of the inclination and of the opportunity. Then the learned lord justice went on:

"There is no need for evidence of kissing and that sort of thing. I ask myself this question: If Mr. Cockburn and the wife had not been called as witnesses, would there have been the slightest doubt on the evidence that adultery had been committed?"

Then he poses the question slightly differently, but, as I venture to suggest, more accurately:

"Would not the evidence have been abundantly sufficient to establish adultery? I should have thought that there could be no doubt about that. Did these two witnesses remove that presumption?"

That is not saying that there was an irrebuttable presumption. It is saying exactly the opposite. It is saying that that class of evidence affords very strong prima facie proof, but that it is rebuttable. He then discusses whether it was, in fact, rebutted, and, without going into details, of which we have no knowledge because we have not sent for the papers in the case and it is not stated exactly in the report what the particular conflict was about, the learned lord justice then points to some letter which shows that the wife in that case was not a truthful witness. He observes that the judge had said that she was a very unsatisfactory witness, and added that the man was "tarred with the same brush". So that it was not a case of demeanour. In other words, it came within the third proposition in LORD THANKERTON's opinion in *Watt (or Thomas) v. Thomas* (1):

"The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

There was also the suggestion that there had been misdirection on the point that there was no evidence of inclination. In my view, that judgment does not support the proposition either that the evidence, which is abundantly sufficient to establish adultery, raises an irrebuttable presumption, or estops the parties charged from giving evidence to the contrary, or leads in law to the conclusion that they must be "deemed", notwithstanding evidence to the contrary, to have committed adultery.

I see no reason for differing from the view of justices who plainly understood the very strong nature of the evidence they had been given, but who, nevertheless, believed the two people concerned on their oath that adultery had not been committed at all, and, in particular, had not been committed in the circumstances which prevailed on the night of Apr. 20. In my opinion, this appeal fails.

DAVIES, J., stated the facts and continued: If the evidence stopped at the events of Apr. 20, 1952, and the inclination to commit adultery, it is plain, to use one phrase that occurs in the justices' reasons, that there was ample evidence to support a conclusion of adultery. Indeed, if the evidence stopped there, it might well be said that the case fell within the passage, which was so

much pressed on this court, from the judgment of LORD HANWORTH, M.R., in *Woolf v. Woolf* (1):

" . . . human nature being what it is, adultery must be inferred here."

But the evidence did not stop there. Both the wife and the alleged paramour went into the witness-box and swore on oath that they had not, either on that night or on any other occasion, committed adultery. They supported that by reasons, and the justices believed them. This court is now asked to say that the justices had no right to believe them, but that on the facts of this case, on some suggested principle—whether it is called estoppel, irrebuttable presumption, assumed adultery, constructive adultery, or I know not what—any court must infer the commission of adultery despite the sworn testimony of the accused persons to the contrary. I know of no such principle. In my judgment, there is no such principle. *Woolf v. Woolf* (1), as my Lord has pointed out, deals with an entirely different set of facts. The evidence was all one way and was wholly uncontradicted, and the question was whether there was such a *prima facie* case that the court was bound to act on it. This case, a defended case, where the evidence is contradicted, is, in my opinion, wholly different. The second way in which this case is put by counsel for the husband, who never shrank from the propositions which he advanced to this court, however startling they might appear to be, was that the position of a wife who has obtained an order for maintenance on the ground of desertion, and knows, as I suppose she must be deemed to know, of the provisions of the Summary Jurisdiction (Married Women) Act, 1895, s. 7, is that, even if she has not actually committed adultery, she must not do anything which might entitle a court to make a finding of adultery against her, and, if she does do any such thing, then her order must be discharged. If that is the second proposition, there is no authority for it at all. Finally, if we are asked to substitute our own view, and I indicate no view of my own, on this evidence for that of the justices, in my judgment, this is clearly not a case in which an appellate court could take on itself the burden of doing any such thing. There is plainly here no misdirection of themselves by the justices. Clearly, as my Lord has already indicated, there is nothing unsatisfactory in the reasons which they have given. It is admitted by counsel for the husband that he is unable to point to a single factor, a single piece of evidence in which, as was the case in some of the authorities at which we have been invited to look, it could be said that either of the persons accused of adultery has given unsatisfactory or false evidence in some other, even collateral, matter, so that it could be said that the witness was an unsatisfactory witness, and that, therefore, this court should substitute its own view, whatever that might be, for that of the justices who heard the evidence of these people and believed them. In my judgment, this is a case in which it is impossible for this court to do any such thing. For these reasons I agree with my Lord that this appeal fails.

Appeal dismissed.

Solicitors: *Ferris & Reed* (for the husband); *Pratt & Wegg-Prosser* (for the wife).
G.F.L.B.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., FINNEMORE AND MCNAIR, JJ.)

October 15, 1952

MEAD v. PLUMTREE

Town and Country Planning—Enforcement notice—Validity—Date on which notice to take effect not specified—No appeal against notice to justices—Subsequent summons for contravention of notice—Right to question validity of notice—Town and Country Planning Act, 1947 (10 and 11 Geo. 6, c. 51), s. 23 (4).

An enforcement notice under s. 23 of the Town and Country Planning Act, 1947, was served by the respondent, on behalf of the local planning authority, on the appellant, requiring him to remove materials from land occupied by him and to discontinue the use of the land "within fifty-six days after the service of this notice. Dated this 27th day of June, 1951," and a footnote was appended "not less than twenty-eight days." An information under s. 24 (3) of the Act for disregarding the notice was preferred against the appellant who was convicted and fined by a court of summary jurisdiction. The appellant appealed to quarter sessions against the conviction, and he there desired to raise the point that the notice did not comply with the Act and was bad, but quarter sessions were of opinion that, as he had not appealed against the notice to a court of summary jurisdiction under s. 23 (4) of the Act, they had no jurisdiction to inquire into the validity of the notice, and, holding that they were bound by the decision in *Perrins v. Perrins* (1951) (115 J.P. 346) they dismissed the appeal.

HELD, (i) that the notice was invalid, for s. 23 (3) required that such a notice should specify both the date on which it was to take effect (which the notice in question did not) and also the period within which the work was to be done as from the date on which the notice took effect.

Burgess v. Jarvis (1952) (116 J.P. 161), followed.

(ii) The notice being invalid, the occupier was not precluded from relying on its invalidity as a defence to proceedings under s. 24 (3), since s. 23 (4) provided for an appeal to a court of summary jurisdiction on the grounds specified in paras. (a) and (b) thereof only against a notice which was valid.

Perrins v. Perrins (1951) (116 J.P. 346), distinguished.

CASE STATED by the appeal committee of Essex Quarter Sessions.

At a court of summary jurisdiction sitting at Chelmsford on Nov. 15, 1951, the appellant, Mead, was convicted of having since Aug. 23, 1951, without permission under Part III of the Town and Country Planning Act, 1947, used land in the parish of Writtle, Essex, for the deposit of waste, scrap, and other materials in connection with the business of a general dealer in contravention of an enforcement notice served on him on or about June 27, 1951, by Chelmsford Rural District Council as agents for Essex County Council, the local planning authority, contrary to s. 24 (3) as extended by s. 75 (1) of the Act. He appealed against the conviction to quarter sessions.

At the hearing by quarter sessions on Feb. 14, 1952, it was proved or admitted that the appellant was the occupier of the land and used it as a site for the deposit of waste, scrap, and other materials in connection with the business of a general dealer in contravention of previous planning control within the meaning of s. 75 (1) (9) of the Town and Country Planning Act, 1947, and that such use constituted development within the meaning of s. 12 (2) (3) and (4) of the Act and was continuing. Chelmsford Rural District Council had served on the appellant an enforcement notice, dated June 27, 1951, which recited the facts as to user of the land and continued:

"Now therefore the rural district council of Chelmsford do hereby give you notice in pursuance of their powers as agent of the local planning authority under s. 23 and s. 24, as extended by s. 75 of the [Town and Country

Planning Act, 1947], to remove the said materials from the said land and to discontinue the said use within *fifty-six days after the date of the service of this notice . . .

[Footnote] *Not less than twenty-eight days".

The appellant had not obtained permission for the use of the land under Part III of the Act of 1947. He took steps to appeal against the enforcement notice, but the steps were ineffective and no valid appeal was prosecuted. He contended that the enforcement notice was defective and a nullity in that it did not specify a date on which it was to take effect as required by s. 23 (3) of the Act of 1947, and that, as s. 23 (4) provided no appeal against a notice which was defective for this reason, he was entitled to rely on the defect as a defence to a charge alleging non-compliance with the notice. Chelmsford Rural District Council contended that the enforcement notice was good, and that, even if it was defective for the reasons alleged, the appellant was precluded from relying on the defect through his failure to appeal against the notice under s. 23 (4), and quarter sessions had no jurisdiction to entertain the question of the validity of the notice.

Quarter sessions held that they were bound by the decision in *Perrins v. Perrins* (1) to hold that they had no jurisdiction to entertain the question of the validity of the notice and dismissed the appeal. The appellant appealed.

Percy Lamb, Q.C., and *Jellinek* for the appellant.

Beney, Q.C., and *Hines* for the respondent.

LORD GODDARD, C.J.: This is a Case stated by the appeal committee of the quarter sessions for the county of Essex to which the appellant appealed against a conviction by justices of the offence of disregarding an enforcement notice. A notice served on him ordered him to discontinue the use of land in his occupation for the purpose for which he was using it. He ignored that notice, and he was summoned and fined. He appealed to quarter sessions against the conviction, and sought to take the point that the notice served on him was a bad notice and, therefore, he should never have been convicted by the justices because he was not bound to comply with the notice which was not such a notice as the Act required. Quarter sessions held that they had no jurisdiction to entertain the appeal because the case was covered by the decision of this court in *Perrins v. Perrins* (1) and they dismissed the appeal. With all respect to the learned chairman and the appeal committee, I have difficulty in understanding how they thought that *Perrins v. Perrins* (1) had anything to do with this case.

A notice was served on the appellant dated June 27, 1951, several months before the decision of the Court of Appeal in *Burgess v. Jarvis* (2), which, if it had been given beforehand, I have no doubt would have caused the notice to be in a very different form. The notice required him to remove materials from the land and to discontinue the use

"within fifty-six days after the date of the service of this notice. Dated this June 27, 1951; "

and a footnote to the fifty-six days is appended: "Not less than twenty-eight days". I should have thought that made it more obscure, rather than clearer, since s. 23 (3) of the Town and Country Planning Act, 1947, says:

"Subject to the provisions of the next following sub-section, an enforcement notice shall take effect at the expiration of such period (not being less

(1) 115 J.P. 346; [1951] 1 All E.R. 1075; [1951] 2 K.B. 414.

(2) 116 J.P. 161; [1952] 1 All E.R. 592; [1952] 2 Q.B. 41.

than twenty-eight days after the service thereof) as may be specified therein."

The appellant contended that it was a defective notice because the section requires an enforcement notice to specify the date at which it is to take effect.

In my view, the only construction that can be placed on the words of the sub-section is that the notice must specify the date at which it is to take effect, and that that date must be not less than twenty-eight days after the service, the object being to give the recipient a chance of appealing or of seeing the town planning authorities and, perhaps, persuading them to take a different view. The recipient must also be told within what time he is to do the work. This notice does not say when it is to take effect. It simply tells the appellant that he is to discontinue using the land for the purpose within fifty-six days after the service of the notice. Counsel for the respondent has suggested that the notice should be read as meaning that the notice will take effect in twenty-eight days and that the appellant has twenty-eight days in which to do the work. We cannot hold that that is what the notice says or that that would comply with the section, and that is the opinion expressed by the Court of Appeal in *Burgess v. Jarvis* (1). Counsel for the respondent said that, as this was a criminal case, we were at liberty to disregard the decision of the Court of Appeal in *Burgess v. Jarvis* (1), but I should be sorry to disregard a decision of the Court of Appeal merely because we are sitting on an appeal from justices and the Court of Appeal were sitting on an appeal from a judge in chambers in a civil proceeding. Moreover, not only should I not feel at liberty to do so, but this section can only be construed in one way—that a notice must contain two dates, i.e., the date when the notice is to take effect (which must be not less than twenty-eight days from the service) and the time within which the work is to be done from the date on which the notice takes effect.

That was not done here, and the position would appear to be as the appellant contends—that, as a bad notice was served on him, he committed no offence. It is said, however, in argument that quarter sessions had no jurisdiction to decide that particular point. It would be odd if the justices before whom the appellant was summoned for failing to comply with the notice could not go into the question whether it was a good or a bad notice, and could hold that he had committed an offence while refusing to hear his plea that the notice was one with which he was not bound to comply. The difficulty which seems to have been present in the minds of the committee is this. Section 23 (4) gives certain rights of appeal against a notice, which means a valid notice and not one not complying with the Act. It provides:

" . . . and on any such appeal the court—(a) if satisfied that permission was granted under this Part of this Act for the development to which the notice relates, or that no such permission was required in respect thereof, or, as the case may be, that the conditions subject to which such permission was granted have been complied with, shall quash the notice to which the appeal relates; (b) if not so satisfied, but satisfied that the requirements of the notice exceed what is necessary for restoring land to its condition before the development took place, or for securing compliance with the conditions, as the case may be, shall vary the notice accordingly . . . "

That is what can be contended on an appeal against a notice. The recipient can say: "This notice never ought to have been served on me because I had received, or did not require, permission", or: "I have carried out the conditions

subject to which permission was granted", or: "This notice exceeds what is reasonable for me to be called on to do". The sub-section does not provide for an appeal against the notice on the ground that it is a bad notice because that involves, not an appeal against the notice, but a contention that the recipient never had a notice served on him at all, which is what the appellant contends in this case. Quarter sessions, however, thought they could not entertain the point because s. 24 (1) provides that a person who is entitled to appeal against a notice under s. 23 (4) and does not do so cannot dispute, in any proceedings to recover expenses reasonably incurred by the local planning authority in doing the work on his default, the validity of the notice on any ground which could have been raised on such an appeal. Quarter sessions thought they were bound by the decision of this court in *Perrins v. Perrins* (1), but that case has nothing to do with this case. There the occupier of land received a notice under the Town and Country Planning Act, 1947, s. 23 (1), to cease using it as a camping site. When summoned for disobeying the notice, he contended that he ought not to have been served with it because he had always used the land as a camping site. It was held that he could not go into that question because it was an objection to the notice which could have been taken by way of appeal under s. 23 (4), and, by s. 24 (1), if it was not taken by way of appeal, it could not be raised in the proceedings. That has no application here because this point is not one in respect of which jurisdiction is given to justices on such an appeal against the notice, and, therefore, the appellant can now raise it by way of defence. The case must go back to quarter sessions with the intimation, first, that they had jurisdiction to hear the appeal, and, secondly, that, in view of the decision in *Burgess v. Jarvis* (2) and in the opinion of this court, this enforcement notice was bad and they ought to allow the appeal.

FINNEMORE, J.: I agree.

McNAIR, J.: I agree.

Appeal allowed.

Solicitors: *Robbins, Olivey & Lake*, agents for *W. P. Hill*, Hertford (for the appellant); *Torr & Co.*, agents for *Stamp Wortley & Co.*, Chelmsford (for the respondent).

T.R.F.B.

(1) 115 J.P. 346; [1951] 1 All E.R. 1075; [1951] 2 K.B. 414.
(2) 116 J.P. 161; [1952] 1 All E.R. 592; [1952] 2 Q.B. 41.

PROBATE, DIVORCE AND ADMIRALTY DIVISION

(LORD MERRIMAN, P., AND DAVIES, J.)

Oct. 15, 1952

COOPER v. COOPER

Husband and Wife—Maintenance—Conflict of jurisdiction—Decree of judicial separation—Application to High Court for permanent alimony discharged—Summons for maintenance in court of summary jurisdiction.

On Oct. 9, 1946, the wife obtained a decree of judicial separation. On Nov. 15, 1947, she applied to the registrar for an order for the payment of permanent alimony. In April, 1948, the husband agreed to pay the wife a weekly sum for maintenance. Subsequently he defaulted, and on Jan. 16, 1952, the wife's application for permanent alimony was, at her request, dismissed, on Jan. 21 she applied to justices for a summons for a maintenance order against her husband on the ground that he had wilfully neglected to maintain her, and on Feb. 22 that summons was dismissed by the justices on the ground that, if they entertained it, there would be a conflict of jurisdiction with the High Court where the suit for judicial separation was still in existence.

HELD: on Jan. 16, 1952, the then existing proceedings for alimony in the High Court were terminated; the mere fact that the wife had a right to make a further application to the High Court for permanent alimony, or the possibility that at some future date she might make such an application, did not create either an actual conflict of jurisdiction or a reasonable likelihood or probability of such a conflict between the court of summary jurisdiction and the High Court; and, therefore, the justices were bound to hear and determine the summons.

Pooley v. Pooley (1952) (116 J.P. 108), applied.

Quære whether as a result of the difference in wording between s. 190 (4) of the Supreme Court of Judicature (Consolidation) Act, 1925, and s. 20 (2) of the Matrimonial Causes Act, 1950, the principles relating to the time within which an application for permanent alimony must be made after a decree of divorce or nullity now apply to such an application after a decree of judicial separation, and whether r. 45 of the Matrimonial Causes Rules, 1950, is *ultra vires*.

APPEAL by the wife against the dismissal by justices for the Parts of Lindsay, Lincolnshire, sitting at Grimsby, on Feb. 22, 1952, of her summons alleging that her husband had wilfully neglected to provide reasonable maintenance for her.

The parties were married in 1931 and in January, 1945, the wife filed a petition for judicial separation on the ground of the husband's adultery. On Oct. 9, 1946, a decree was pronounced in her favour. On Nov. 15, 1947, the wife applied by summons in the Grimsby district registry for an order for permanent alimony. In January, 1948, the summons was adjourned *sine die*, and on Apr. 1, 1948, an agreement was made between the parties whereby the husband agreed to pay the wife a weekly sum of money for her maintenance. The husband having defaulted in the payment of that sum, on Jan. 16, 1952, on the wife's application, the registrar dismissed her application for permanent alimony, and on Jan. 21, 1952, she took out a summons for a maintenance order, alleging against her husband wilful neglect to maintain her. On Feb. 22 that summons was dismissed on the ground that there would be a conflict of jurisdiction with the High Court. The wife now appealed.

D. H. Robson for the wife.

Gillis for the husband.

LORD MERRIMAN, P.: This is a wife's appeal against the dismissal by justices for the Parts of Lindsay, Lincolnshire, sitting at Grimsby on Feb. 22, 1952, of her summons for wilful neglect to provide reasonable maintenance.

The justices dismissed the summons, holding, in effect, that they had no jurisdiction to decide the case—though I am willing to assume that, in using those words, they meant that they should stay their hands so as to avoid a supposed conflict of jurisdiction with the High Court. I make that qualification because it is important to bear in mind that Parliament has invested courts of summary jurisdiction with powers in matrimonial disputes which in many respects are identical with those possessed by the High Court. The most that this court, or, as far as I know, any court has said, while recognising the co-existence of the two jurisdictions, is that, if there is conflict between them, the court of summary jurisdiction should hold its hand, at any rate until the risk of conflict is past. The wife's case here is that there is no conflict. [His Lordship stated the facts and continued:] It seems to me to be impossible to dispute that when the application for permanent alimony was dismissed on Jan. 16 1952, it was disposed of and no longer existed. From that it follows, it seems to me, that when on Jan. 21, 1952, the wife took out her present summons on the ground of wilful neglect to maintain there neither was, nor could be, any conflict between that summons and the application for permanent alimony instituted by her in November, 1947. But it is said that her suit in the High Court still existed, for she had deliberately elected to proceed for a judicial separation in the High Court on the ground of her husband's adultery instead of going to the justices who, under the Matrimonial Causes Act, 1937, s. 11 (1), had power to make a separation or a maintenance order on the ground of that adultery, and, therefore, because the institution of that suit gave, and still gives, all the rights to ancillary relief which may be claimed in the High Court in such a suit, there is, notwithstanding the dismissal of her application for alimony, a conflict of jurisdiction. The justices give their reasons for dismissing the summons as follows:

"In 1945 the wife had two courses open to her. She could have taken out a summons under the Summary Jurisdiction (Married Women) Act, 1895, or she could commence proceedings in the High Court. She elected to adopt the latter alternative, and did, in fact, obtain an order in the High Court, with all the rights and remedies attaching thereto, the most important right so far as this matter is concerned being her right to apply for permanent alimony, and this right was exercised by summons in 1947 and remained on the file until it was dismissed in January, 1952, upon the application of the wife."

They refer to various cases, including *Higgs v. Higgs* (1), in support of the proposition, which I have assumed in favour of the husband, that during the whole of that time the High Court was seised of the matter. Then they say that it had been contended that on and after Jan. 16, 1952, all proceedings in the High Court were at an end and that an election was again open to the wife, but that, in the absence of any cited authorities, they came to the conclusion that

"... when the wife elected to proceed in the High Court and obtained a decree for judicial separation in that court the High Court became seised and remained seised of the matter despite the wife's efforts to put an end to such jurisdiction, for the decree obtained in the High Court is still in existence and the rights accruing to the wife under the Matrimonial Causes Rules, 1950, r. 45, are still open to her at any time."

Before dealing with the main point of this case I regret to say that I have

(1) 98 J.P. 443; [1935] P. 28.

appreciated for the first time that it is not clear on the face of r. 45 that when the rule provides that the wife in a suit for judicial separation can apply for alimony at any time it is *intra vires*. The point arises in this way. Section 190 (4) of the Supreme Court of Judicature (Consolidation) Act, 1925, so far as is relevant, reads:

"Where any decree for . . . judicial separation is made on the application of the wife, the court may make such order for alimony as the court thinks just. . ."

In other words, all that was necessary was that a decree for judicial separation should have been made, and made on the application of the wife. But there was a change in the wording of the Matrimonial Causes Act, 1950, s. 20 (2) of which reads:

"On any decree for judicial separation, the court may make such order for the payment of alimony to the wife as the court thinks just."

As is well known, the use of the words "on any decree" in connection with the earlier sub-sections of s. 190 of the Supreme Court of Judicature (Consolidation) Act, 1925, in their application to divorce and nullity has given rise to a great deal of litigation. Suffice it to say that judicial attempts to release the fetters imposed by those words have not met with universal success, and it is certain that "on any decree" and "where any decree is made" are not synonymous expressions. When, therefore, the group of sections relating to alimony, maintenance and custody of children in the Matrimonial Causes Act, 1950, perpetuates the words "on any decree" for divorce or nullity and uses the same formula with reference to a decree for judicial separation, it is likely to lead to the suggestion that the word "on" must have the same significance wherever it appears, even if it can be argued—as, no doubt, it could be argued—that regard must be had to the fact that one case is dealing with a marriage which has been dissolved and persons who are no longer husband and wife, while the other is dealing with persons who, though judicially separated, are still husband and wife. Nevertheless, the question will still arise whether the Rules Committee exceeded their powers in keeping alive the effect of the old wording of the Act of 1925 by saying in r. 45 that:

"An application for permanent alimony may be made at any time after a decree for judicial separation . . . has been pronounced."

I have looked at the Parliamentary transactions which led up to the Act of 1950. There was, as the memorandum which is called for by the standing orders of the House shows, an intention to make a slight alteration in the law, but it was plainly not the intention to make an alteration which had the effect suggested. What was intended was, as the memorandum shows, to enable the court to give the wife alimony on a judicial separation, whether the proceedings were initiated by her or by her husband. The real emphasis is not "on any decree" but "on *any* decree". Before leaving this side-issue I ought to say that counsel for the wife argues that on any view of the matter it would be difficult, after the lapse of six years from the making of the decree and after the dismissal, on her own application, of her original application for alimony, allowing the utmost liberality of interpretation to the word "on" in reference to a suit for judicial separation as contrasted with a suit for divorce, to say that any application now brought by the wife could, by any stretch of construction, be described as "on the decree" which she obtained in 1946.

Though it has been necessary to notice that point, because it is one of some

public importance, it is, in my opinion, a comparatively subsidiary matter in this case, for the real substance of the justices' reasons and of the argument that has been addressed to us in support of them is that the mere existence of the proceedings for judicial separation always has raised, and still raises, a conflict of jurisdiction in connection with maintenance. The justices say that the argument to the contrary is unsupported by any authority. I think there is authority to the contrary, namely, *Pooley v. Pooley* (1), where a wife who had obtained a maintenance order on the ground of desertion had, on the ground of the continuation of the same desertion for the statutory period, obtained a decree of divorce, and then wished to bring ancillary proceedings for maintenance in the High Court, in order to do which, realising rightly that she could not have two maintenance orders running at the same time and so proceedings for maintenance in one court while there was already a subsisting order in another court of competent jurisdiction would not be encouraged, applied to the magistrate for the discharge of her subsisting order. The magistrate refused to discharge it on the ground that the mere exercise of the jurisdiction to discharge it, albeit to evade a conflict of jurisdiction, would give rise to such a conflict. The present is the converse case, but I think there are passages in the judgments which dispose of the suggestion that the mere presentation of a petition, whether for divorce or judicial separation, because thereunder it will be possible to exercise certain rights to claim maintenance, ipso facto raises a conflict of jurisdiction. I will read the headnote ([1952] P. 65):

"A wife who is taking divorce proceedings is entitled to pursue her rights for maintenance for alimony pending suit in the divorce court provided that she has any existing order for maintenance made under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, discharged. But she is under no obligation to apply for the discharge of that order before presenting a petition for divorce; and such an application creates no conflict between the two jurisdictions."

That is an accurate summary of certain passages in the judgments. The point, I think, is that, if the contention is correct that the mere presentation of the petition and the subsistence of the suit, even after the pronouncement of a decree, creates a conflict of jurisdiction, it would be necessary to get rid of the justices' order before presentation of the petition, but that, we were careful to say, was not so. I will read one passage ([1952] 1 All E.R. 396):

"Even if the course which the magistrate suggests is the proper solution of the difficulty, namely, making an application to the Divorce Court, having it adjourned for a specified period, and then going back to the magistrate's court to get the order set aside, the matter is still pending in both courts. There is no escape from it unless one thing is done, namely, that she goes to the magistrate [for the discharge of her order] before presenting her petition. In my opinion, there is no obligation on her to do that."

I think the true effect of that decision may be summarised as being that the mere possibility that identical issues may arise in the High Court and in the court of summary jurisdiction does not give rise to a conflict of jurisdiction. It is the identity of the actual issues in the two courts which is the mischief at which decisions like *Higgs v. Higgs* (2) and the decision of BARNARD, J., in *Kilford v. Kilford* (3) are aimed.

(1) 116 J.P. 108; [1952] 1 All E.R. 395; [1952] P. 65.

(2) 98 J.P. 443; [1935] P. 28.

(3) 111 J.P. 495; [1947] 2 All E.R. 381; [1947] P. 100.

In my opinion, when the wife issued the present summons five days after the dismissal on Jan. 16, 1952, of her application in the High Court, there was no conflict. The mere possibility that she might raise further proceedings in the High Court for alimony or maintenance will not do, though, as I have said, I think her right to do so in the same form is extremely doubtful in the circumstances of this case. But I think the principle has a wider application, for, apart altogether from any proceedings which she could take for alimony in the suit for judicial separation, under the Matrimonial Causes Act, 1950, s. 23 (1), she has the right to sue in the High Court for wilful neglect to maintain. If she did so, there would be a conflict of jurisdiction with her present summons, but the mere possibility that she might do so or the mere fact that she has the right to do so does not, in my opinion, raise any conflict of jurisdiction at all. The appeal should be allowed, the order dismissing the wife's summons set aside, and the matter sent back for determination.

DAVIES, J.: I agree. As my Lord has said, there is in many respects a co-equal jurisdiction between courts of summary jurisdiction, on the one hand, and the High Court, on the other, in these matters which arise between husband and wife. The principle, as I have always understood it, which applies to such cases, is that if on the same issue between the same parties there is an actual conflict of jurisdiction, or a reasonable likelihood or probability of such a conflict of jurisdiction, the inferior court, as a matter of obvious convenience and public policy, should not proceed with the hearing of the summons.

If that is right and one applies that principle to the facts of the present case, it is, in my judgment, plain that there was no actual conflict of jurisdiction. In January, 1952, the proceedings for alimony in the judicial separation suit were finally terminated, so that when this matter came before the justices in February there was no proceeding for alimony at all in the High Court. There then being no actual conflict of jurisdiction, was there, in the words I have used, a reasonable likelihood or probability of a conflict of jurisdiction? What is said on behalf of the husband is this: True, those proceedings had been put an end to by the order of the district registrar, but the suit for judicial separation was still in existence, the decree having been pronounced, and at any time the wife could apply for alimony, in which event the same issues would arise. In my opinion, that speculative possibility does not give rise to such a reasonable likelihood or probability of a conflict of jurisdiction as should have induced the justices to dismiss the summons before them. After all, the wife in this case, who is entitled, other things being equal, to choose the court in which she will proceed, had done all she could to make it plain that she was not going on in the High Court, but was going on in the court of summary jurisdiction. This case is almost the converse of *Pooley v. Pooley* (1), and I need read only two sentences from the judgment of my Lord in that case ([1952] 1 All E.R. 397):

"I think the whole of the suggestion that there is a conflict between the two jurisdictions in getting rid, pending suit, of the old order, is a fallacy. The truth and the reality of the matter is that the application is made to ensure there is no overlapping between the two."

That is exactly what the wife in the present case did when she went to the district registrar and had the proceedings in the High Court disposed of. Therefore, in my opinion, on Feb. 22, 1952, when this matter came before the justices, not only was there no actual conflict, but there was no reasonable likelihood or probability of a conflict of jurisdiction, and they should have proceeded.

That is sufficient to dispose of the present appeal, but two other points were taken by counsel for the wife. His submission is that not only was there no reasonable likelihood of a conflict, but that there could in no event ever again have arisen any conflict. The first ground for that submission is that once the application for alimony has been dismissed it could not thereafter be renewed. That point was not fully argued before us, and I do not propose to express any opinion about it one way or the other. The other ground raises, as my Lord has said, matters of very much more general importance and interest. The proposition is that as the result of the change of wording in s. 20 (2) of the Matrimonial Causes Act, 1950, as compared with that of s. 190 (4) of the Supreme Court of Judicature (Consolidation) Act, 1925, and the difference between the words, "Where any decree for . . . judicial separation is made", and the words, "On any decree for judicial separation", the same principles which have hitherto been applied to applications consequent on divorce or nullity should apply to applications consequent on judicial separation. As we all know from many cases, of which, perhaps, the best-known is *Scott v. Scott* (1), it has been held that, without putting any final and precise limit of time on it, "on any decree" means within, at any rate, a reasonably short time after the decree. Counsel argued that that principle must now, as the result of the change of the wording in the Act, be applied to applications for permanent alimony. As I have said, it is not, in my judgment, necessary to pronounce, for the purposes of this appeal, a final view on that contention, but it does seem to me that there is a great deal of force in that argument. It may well be that on that point alone not merely is there no reasonable likelihood of the wife applying again in the judicial separation suit, but that, in fact, by the wording of the Act, after the lapse of six years, she is now barred in law as well.

Appeal allowed.

Solicitors: *Theodore Goddard & Co. and Deacons & Pritchards*, agents for *H. K. & H. S. Bloomer & Co.*, Grimsby (for the wife); *Russell Jones & Walker*, agents for *Pearlman & Rosen*, Hull (for the husband).

G.F.L.B.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., FINNEMORE AND McNAIR, JJ.)

October 16, 1952

TAYLOR v. KENYON

Road Traffic—Driving while disqualified for holding licence—Denial of knowledge of disqualification—Mens rea—Offence absolutely prohibited by statute—Road Traffic Act, 1930 (20 and 21 Geo. 5, c. 43), s. 7 (4).

In October, 1951, the respondent, who was charged with driving a motor vehicle at an excessive speed, did not attend the hearing of the summons, but forwarded his licence to the court. He was convicted, fined, and disqualified for holding a licence for three months, his licence being retained by the court. The clerk of the court sent to the respondent a communication containing a notice of fine and a letter informing him of the disqualification. The respondent paid the fine, but he made no enquiry about his licence. On Nov. 29, 1951, he drove a motor vehicle on a road, and was charged with driving when disqualified for holding a licence, contrary to s. 7 (4) of the Road Traffic Act, 1930. The respondent stated that he had received the communication from the clerk of the court, but had omitted to observe the letter relating to disqualification. The justices dismissed the information.

Held, that the case must be remitted with a direction to convict, per LORD GODDARD, C.J., and FINNEMORE, J., on the ground that s. 7 (4) imposed an absolute prohibition on driving when disqualified, which came into operation as soon as the sentence of disqualification was pronounced in open court; per McNAIR, J., on the ground that the respondent had deliberately refrained from making enquiries the result of which he did not wish to know.

CASE STATED by county of Chester justices.

At a court of summary jurisdiction sitting at Wilmalw on Feb. 22, 1952, the appellant, a superintendent of police, preferred an information against the respondent, John Ronald Kenyon, charging that on Nov. 29, 1951, he, then being disqualified under Part I of the Road Traffic Act, 1930, for holding or obtaining a licence, did unlawfully drive on a highway a motor lorry, contrary to s. 7 (4) of the said Act.

It was proved or admitted that on Oct. 18, 1951, the respondent was convicted by a court of summary jurisdiction sitting at Nuneaton of the offence of exceeding a speed limit, was fined £2 10s., and was disqualified for holding or obtaining a licence for the period of three months from that date. There was no appearance by or on behalf of the respondent who had sent his driving licence to the court prior to the hearing. On Oct. 18, 1951, the clerk to the justices wrote to the respondent informing him that he had been convicted, fined, and also disqualified for holding a licence. In the envelope containing that letter there was also a notice relating to the fine. The respondent received the envelope containing the said documents, but, having taken out the notice of fine, overlooked the letter and was never aware of its contents or even its existence. The respondent paid his fine, but he never received back his driving licence at any time up to Nov. 29, 1951. It had occurred to the respondent that he might have been disqualified, but he took no steps to find out what was the position with regard to his licence. On Nov. 29, 1951, he drove a motor lorry on a highway, he not then in fact knowing that he was disqualified.

It was contended on behalf of the appellant that on the evidence, even if the respondent did not actually know that he was disqualified for holding a licence, he had sufficient mens rea to render him guilty of the offence, and, alternatively, that mens rea was not a necessary ingredient of the offence charged. On behalf of the respondent it was contended that, as he did not know of the disqualification,

he could not be convicted of the offence. The justices dismissed the information, and the superintendent appealed.

R. J. Parker for the appellant.

P. J. M. Thomas for the respondent.

LORD GODDARD, C.J., stated the facts and continued: It was a very proper thing for the clerk of the court to send the respondent a notice of the fine which had been imposed and a letter telling him of the disqualification. Whether it is necessary in law to send those documents is a different matter, because the decision of the justices is pronounced in open court, and, once it is pronounced and entered in the court register, it is the judgment of the court.

The respondent managed to persuade the justices before whom he was charged with driving while disqualified that through some mishap, although he took out of the envelope the notice of the fine, he did not take out the letter telling him he had been disqualified. I say frankly that I should have had very great difficulty in accepting that evidence, for, in my view, the respondent well knew there was another letter in the envelope and did not want to know what was in it. He admitted in court that he had suspected he might have been disqualified, but he made no inquiry. This seems to me to be a clear case of a man shutting his eyes to the obvious and refraining from getting information which he did not want to get. But, in my opinion, it is not necessary to go into that question at all. In s. 7 (4) of the Road Traffic Act, 1930, there is an absolute prohibition against a person driving when he is disqualified, and, if a sentence of disqualification is pronounced in open court, there is an end of it. He is disqualified, and he is given notice of the disqualification by the court retaining his licence. In my opinion, this case must go back to the justices with an intimation that the offence was proved and a direction to convict, and I am far from saying this is in any way an excusable case or that special reasons exist in it for not putting in force the salutary provision of the statute which regards this as a very serious offence.

FINNEMORE, J.: I agree.

McNAIR, J.: In this case I do not feel it necessary to express any opinion on the question which has been argued as to whether mens rea is necessary for an offence under s. 7. I think, with my Lord, that the only possible inference to be drawn from the facts found by the justices is that the respondent deliberately refrained from making inquiries the result of which he might not care to have, within the meaning of the expression used by **LORD HEWART, C.J.**, in *Evans v. Dell* (1).

Appeal allowed.

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *Hugh Carswell*, Chester (for the appellant); *Peacock & Goddard*, agents for *Barlow, Parkin & Co.*, Stockport (for the respondent).

T.R.F.B.

(1) 101 J.P. 149, 151; [1937] 1 All E.R. 349, 353.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., FINNEMORE AND McNAIR, JJ.)

October 21, 1952

WOOLLEY v. MOORE

Street Traffic—Maximum speed—Goods vehicle—Vehicle capable of carrying passengers and used solely for that purpose—Road Traffic Act, 1934 (24 and 25 Geo. 5, c. 50), sched. I, para. (2) (a).

The appellant drove a Standard Vanguard motor van, in respect of which a carrier's "C" licence had been granted, along a road which was not subject to any speed limit at a speed exceeding thirty miles an hour. The van contained seats in the front for the driver and one passenger and no seats behind, and at the material time it was not carrying any goods. Under sched. I, para. 2, to the Road Traffic Act, 1934, as amended by the Motor Vehicles (Variation of Speed Limit) Regulations, 1950, the maximum speed for goods vehicles of that class or description was thirty miles an hour. Justices convicted the appellant under s. 10 (1) of the Road Traffic Act, 1930, of exceeding the speed limit appropriate to the class of vehicle in question.

HELD, that a vehicle constructed as a goods vehicle, but capable of carrying passengers, was, when not carrying goods, not subject to the conditions applicable to the carrier's "C" licence held in respect of it, and that, accordingly, the appellant had not been guilty of the offence charged, and the conviction must be quashed.

Blenkin v. Bell (1952) (116 J.P. 317), applied.

CASE STATED by Nottinghamshire justices.

At a court of summary jurisdiction sitting at Nottingham an information was preferred by the respondent, a police officer, under s. 10 (1) of the Road Traffic Act, 1930, charging the appellant with having on Apr. 12, 1952, at Bestwood, Nottinghamshire, unlawfully driven a motor van on the Nottingham-Mansfield Road at a speed greater than thirty miles an hour, the speed specified in the Road Traffic Act, 1934, sched. I, para. 2 (1) (a), as the maximum speed in relation to a vehicle of that class or description.

At the hearing of the information on May 13 and 16, 1952, it was proved or admitted that on Apr. 12, 1952, the appellant drove a Standard Vanguard motor van on the Nottingham-Mansfield Road, which was not subject to any speed limit, at a speed of between fifty and fifty-five miles an hour. The van was not carrying goods. Inside it at the front there were two seats, one for the driver and one for a passenger. There were no seats in the rear of the van, which was empty. There were windows in the back of the van, but no side windows apart from those beside the driver's and passenger's seats. The unladen weight of the van was one ton, two hundredweight, and all its wheels were equipped with pneumatic tyres. A goods carrier's C licence had been granted by the Traffic Commissioners under Part I of the Road and Rail Traffic Act, 1933, in respect of the van to the registered owners, a limited company of which the appellant was a director. The van was licensed as a goods vehicle under the Vehicles (Excise) Act, 1949, sched. IV, Part I, para. 7. At the material time it was being tested after receiving certain adjustments by the appellant.

The appellant contended that, as the vehicle was not being used for carrying goods, no speed limit was applicable to it. The respondent contended that the van was a goods vehicle as defined in the Road Traffic Act, 1934, sched. I, para. 2 (1) (a), as amended by the Motor Vehicles (Variation of Speed Limit) Regulations, 1950 (S.I., 1950, No. 1705), and was subject to a speed limit of thirty miles an hour. The justices held that the vehicle was a goods vehicle as defined in the Road Traffic Act, 1934, sched. I, para. 2 (1) (a), and was not a

shooting brake or utility van, the dual-purpose class of vehicle concerned in *Blenkin v. Bell* (1). They held, therefore, that the vehicle was subject to a speed limit of thirty miles an hour and convicted the appellant.

Skelhorn for the appellant.

Cowley for the respondent.

LORD GODDARD, C.J.: I can well understand that the justices thought they must put some limit on the decision of this court in *Blenkin v. Bell* (1), but, in my opinion, that case dealt with this very point. In that case we had before us all the statutory provisions and statutory rules and orders which deal with delivery vans and so forth, and we decided, I think largely because of s. 9 (2) of the Road and Rail Traffic Act, 1933, that where a vehicle constructed as a goods vehicle was capable of carrying passengers, although it had a carrier's C licence, the conditions applicable to such a licence did not apply to it when it was not being used for the carriage of goods. In particular, we held that the speed limit of thirty miles an hour to which such a vehicle is subjected when carrying goods was not applicable, and we gave that decision after an examination of a tangle of sections and regulations. The decision did not turn on the fact that the vehicle with which we were dealing was a particular sort of dual-purpose vehicle called a shooting brake, such as is used for going to and from the station and for carrying goods or garden produce. I think I made that clear in the judgment of the court when I said:

"If a vehicle can be used for carrying either passengers or goods, and it is being used for carrying goods, as distinct from passengers' luggage, it requires a licence and certain restrictions are placed on its use on the road. If it were not used as a goods vehicle, it would not require a licence, and the speed limit is only applicable when it is carrying goods."

The Home Secretary has so far recognised that decision that several people convicted contrary to it have been granted free pardons and the fines have been returned. We are not, therefore, going now to entertain an argument that the decision was wrong. It can only be altered by legislation because the case is not appealable. It follows that the decision of the justices in this case was wrong and the conviction must be quashed because the case is governed by and indistinguishable from *Blenkin v. Bell* (1), by which this court is bound and to which it intends to adhere.

FINNEMORE, J.: I agree that this case is indistinguishable from *Blenkin v. Bell* (1), with the decision in which I respectfully agree. We are bound by that decision and this case falls within it, and, therefore, the appeal must be allowed.

McNAIR, J.: I agree. The case is clearly indistinguishable from *Blenkin v. Bell* (1).

Appeal allowed.

Solicitors: *A. J. A. Hanhart*, agent for *Clayton, Ellis & Massey*, Nottingham (for the appellant); *William Charles Crocker*, agent for *R. A. Young & Pearce*, Nottingham (for the respondent).

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., FINNEMORE AND McNAIR, JJ.)

Oct. 21, 1952

JAMES v. DAVIES

Street Traffic—Excise duty—Rate chargeable—"Goods vehicle"—Vehicle "used for the conveyance of goods"—No goods in vehicle—Goods carried in trailer—Vehicles (Excise) Act, 1949 (12, 13 and 14 Geo. 6, c. 89), s. 27 (1).

A mechanically propelled vehicle, namely, a "land rover", licensed as a private vehicle, but constructed for the carriage of goods, when used on a road carried no goods itself, but drew a trailer which was loaded with goods.

HELD: it did not matter whether the goods were laden on the vehicle itself or on a trailer which it was drawing, and, therefore, the vehicle in question was being "used for the conveyance of goods" and was a "goods vehicle" within the definition in s. 27 (1) of the Vehicles (Excise) Act, 1949, and so liable to the higher rate of duty applicable to a vehicle of that class.

Carrimore Six Wheelers, Ltd. v. Arnold (1949) (113 J.P. 456) applied.

CASE STATED by Pembrokeshire justices.

At a court of summary jurisdiction sitting at Haverfordwest an information was preferred by the appellant, a superintendent of police, under the Vehicles (Excise) Act, 1949, charging the respondent with having, on Feb. 29, 1952, in the parish of St. Martin, Pembrokeshire, used on Perrott's Road, Haverfordwest, a motor vehicle, namely, a land rover, licensed under the Vehicles (Excise) Act, 1949, for a purpose which brought it within a class or description of vehicles to which a higher rate of duty was applicable, such higher rate not having been paid before the vehicle was so used, contrary to s. 13 (2) of the Act.

At the hearing on May 19, 1952, it was proved that the respondent was the owner of the land rover which was constructed for the carriage of goods, but was licensed as a private vehicle, duty having been paid at the rate of £10 per annum. On Feb. 29, 1952, the vehicle was standing on Perrott's Road, Haverfordwest, and was not carrying any goods, but attached to it was a trailer containing potato trays. The appellant contended that, as the vehicle was constructed for the carriage of goods and was drawing a trailer loaded with goods, it was a goods vehicle and was liable to pay duty as such, including trailer duty. The respondent contended that the vehicle was not being used for the carriage of goods, and, therefore, was not a goods vehicle and was properly licensed as a private vehicle.

The justices held that there was no evidence that the vehicle was being used for the conveyance of goods, and that it was, therefore, not a goods vehicle within the meaning of s. 27 (1) of the Vehicles (Excise) Act, 1949 (the trailer not being part of the vehicle), and that it was properly licensed as a private vehicle and could legally draw a trailer without further duty being chargeable. They, accordingly, dismissed the information and the appellant appealed.

J. P. Ashworth for the appellant.

Skelhorn for the respondent.

LORD GODDARD, C.J.: This case raises the question: What is meant by "the conveyance of goods"? In my opinion, it is really concluded by the decision in *Carrimore Six Wheelers, Ltd. v. Arnold* (1), because, although that case was under different regulations the ratio decidendi was that, for similar purposes to these, "carry" and "convey" are interchangeable terms. The definition of "goods vehicle" under the Vehicles (Excise) Act, 1949, s. 27 (1), is:

(1) 113 J.P. 456; [1949] 2 All E.R. 416.

" 'goods vehicle' means a mechanically propelled vehicle (including a tricycle weighing more than eight hundredweight unladen) constructed or adapted for use and used for the conveyance of goods or burden of any description, whether in the course of trade or otherwise."

It is found by the justices that the vehicle in question here was constructed for the carriage of goods. Was it being then used for the conveyance of goods? If it was being used to convey goods from one place to another, it seems to me not to matter in the least whether the goods were laden on the vehicle itself or laden in a trailer which the vehicle was drawing. If the view which commended itself to the justices was right, it would follow that furniture removers could move furniture in large pantechicon trailers, and if they drew them by a vehicle which, though constructed to carry goods, had no furniture in it, it could be said that they were not liable to pay the heavier rate of duty for goods vehicles. I think that once a mechanically propelled vehicle is conveying goods, as this vehicle was conveying the goods, although by means of a trailer, the question becomes easy. The vehicle was adapted for use, and it was being used, for the conveying of goods or burden because it was moving potato trays from one place to another. Accordingly, I think this case must go back to the justices with an intimation that the case was proved.

FINNEMORE, J.: I agree.

McNAIR, J.: I agree.

Appeal allowed.

Solicitors: *Treasury Solicitor* (for the appellant); *A. J. A. Hankart*, agents for *J. C. Williams & Roberts*, Carmarthen (for the respondent).

T.R.F.B.

PROBATE, DIVORCE AND ADMIRALTY DIVISION

(LORD MERRIMAN, P., AND DAVIES, J.)

October 22, 1952

WHARTON v. WHARTON

Husband and Wife—Maintenance—Amount—Considerations to be applied—

Desire to effect reconciliation between parties—Conduct of parties—Summary Jurisdiction (Married Women) Act, 1895 (58 and 59 Vict., c. 39), s. 5 (c).

In determining the amount of maintenance to be paid by a husband under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, justices ought not to make an order for a small amount in order to force the wife to agree to a reconciliation. If they wish to effect a reconciliation their proper course is to adjourn the case pending the intervention of the probation officer and to award by way of an interim order such amount as they think appropriate.

Although the Summary Jurisdiction (Married Women) Act, 1895, s. 5 (c), regulating the awards of maintenance in courts of summary jurisdiction, refers to the duty of "having regard to the means" of the parties, that does not exclude any relevant consideration of the conduct of the spouses, and, if the conduct of one spouse is taken into account in determining the amount of the award, the justices should also take into account the conduct of the other spouse.

APPEAL by the wife against an order of justices for the Seaham petty sessional division of Durham, dated July 18, 1952, whereby they awarded her the sum of £1 10s. per week for her maintenance.

The parties were married in 1936. In 1952 the wife became suspicious of the husband's interest in another woman. This led to quarrels between them, and eventually the parties separated. Before the justices the husband admitted desertion, but he said in evidence that whenever the wife could not get her own way she threatened to commit suicide. The justices found (i) that, although the husband had admitted desertion, he had suffered mental cruelty for years due to the wife's threats to commit suicide, and (ii) that there was still a chance of reconciliation, and they fixed the amount of the award at £1 10s. per week. The wife appealed on the ground that this sum was inadequate.

G. J. Cohen for the wife.

Binney for the husband.

LORD MERRIMAN, P., in his judgment, dealing with the first of the justices' reasons, said that, while he did not ignore the principle that, although the Summary Jurisdiction (Married Women) Act, 1895, s. 5, regulating awards of maintenance in courts of summary jurisdiction, referred to the duty of "having regard to the means" of the parties, that did not exclude any relevant consideration of the conduct of the spouses, nevertheless, if the sum of £1 10s. a week, which was anything but adequate on the figures, was to be justified by the wife's supposed misconduct, there should have been thrown into the scale the evidence of an improper association between the husband and the other woman. Dealing with the second of the justices' reasons, **HIS LORDSHIP** referred to *Corkhill v. Corkhill* (1), and said that, if justices wished to effect a reconciliation, the proper way to do it was to adjourn the summons pending the intervention of the probation officer to see whether a reconciliation could be effected, awarding by way of an interim order such amount as they thought appropriate. It was not the proper way to deal with the matter to impose on the wife the disability of an inadequate award, in order, in effect, to starve her into reconciliation.

DAVIES, J.: I agree.

Appeal allowed: amount ordered varied to £4.

Solicitors: *Torr & Co.*, agents for *Morton, Morton & Shaw*, Sunderland (for the wife); *Bellamy, Bestford & Co.*, agents for *Bryan T. Mair*, Sunderland (for the husband).

G.F.L.B.

(1) Oct. 21, 1952 (Divorce Divisional Court) (unreported).

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., FINNEMORE AND MCNAIR, JJ.)

October 23, 1952

HASELL v. MCAULAY

Agriculture—Order by Minister terminating owner's occupation of land—"Land" Dwelling-house and building included—Agriculture Act, 1947 (10 & 11 Geo. 6, c. 48), s. 17 (1) (b).

By s. 109 (2) of the Agriculture Act, 1947, "agricultural unit" means land which is occupied as a unit for agricultural purposes including—(a) any dwelling-house or other building occupied by the same person for the purpose of farming the land

An order made by the Minister of Agriculture and Fisheries under s. 17 (1) (b) of the Act requiring "the occupation of land" to be surrendered by the owner and occupier applies to a dwelling-house or other building included in the land unless such is specifically excluded.

CASE STATED by Somerset justices.

At a court of summary jurisdiction sitting at Keynsham, Somerset, a complaint was preferred by the respondent, an officer of the Somerset County Agricultural Executive Committee and a duly authorised agent of the Minister of Agriculture and Fisheries, under the Agriculture Act, 1947, s. 17 (7), charging the appellant with having failed to comply with an order dated Aug. 27, 1951, made by the Minister under the Agriculture Act, 1947, s. 17 (1) (b), having remained in possession of land, described in the schedule to the order, of which he was the owner and occupier and his occupation of which was required by the order to be surrendered on Jan. 1, 1952.

On the hearing of the complaint on June 6, 1952, it was proved or admitted that the appellant was the owner and occupier of Stockwood Farm, Keynsham, Somerset, consisting of a farmhouse, farm buildings and land and containing 106.614 acres. On Jan. 5, 1950, the Minister made a supervision order under the Agriculture Act, 1947, s. 12 (1), placing the appellant under the Minister's supervision so far as related to his farming of the agricultural unit known as Stockwood Farm. On Aug. 27, 1951, the Minister made an order which, after referring to the supervision order and reciting that the Minister was "satisfied that the farming [of Stockwood Farm] does not show satisfactory improvement" and that the appellant had "failed to comply with directions given to him under Part II of the Agriculture Act, 1947," continued: "Now the Minister, in pursuance of s. 17 (1) of the Agriculture Act, 1947, hereby orders that occupation of the land described in the schedule to the order shall be given up by the [appellant] on Jan. 1, 1952, and that the [appellant] shall, as from that date, let it to a tenant approved by the Minister." The schedule contained a description of land at Keynsham which included the farmhouse and farm buildings. On Feb. 26, 1952, the appellant made a proposal by letter to the respondent that he should let the land to his brother-in-law, who occupied a farm twenty-five miles away, the appellant to retain the farmhouse himself. The county agricultural executive committee rejected the proposal on the ground inter alia that it was "essential that Stockwood Farm should be farmed as a separate unit by an occupier resident in the house and giving full-time attention to the day-to-day work on the holding". The same objection was made to another suggested alternative tenant who occupied a farm ten miles away.

For the appellant it was contended inter alia that the Agriculture Act, 1947, s. 17 (1) (b), gave the Minister power to direct the occupier to give up his occupation of "land", but that "land" did not include a dwelling-house and buildings,

and that the order of Aug. 27, 1951, should have used the term "agricultural unit", as defined in s. 109 (2) (a), if it was intended to include the dwelling-house and buildings. For the respondent it was contended that under the Interpretation Act, 1889, s. 3, unless the contrary intention appeared, "land" included "messuages, tenements, and hereditaments, houses, and buildings of any tenure,"* and that the order, in using the term "land", followed the wording of the Agriculture Act, 1947, s. 17 (1) (b), and no other wording could be used or was necessary to incorporate the dwelling-house and buildings in the scope of the Minister's order.

The justices held that "land" included the dwelling-house and buildings erected on some portion thereof and that the order complied with the provisions of the Agriculture Act, 1947, and they made an order for the appellant to give possession forthwith of Stockwood Farm. The appellant appealed.

Skelhorn for the appellant.

Wingate-Saul for the respondent.

LORD GODDARD, C.J.: Counsel for the appellant has argued that, while the Minister has power to order a farmer to give up land, he has no power to order him to give up an agricultural unit. Before the justices the Interpretation Act, 1889, s. 3, was relied on by the respondent for a definition of the word "land". On the other hand, counsel for the appellant has put forward an attractive argument based on various sections of the Agriculture Act, 1947, which suggested that land might be distinguished from buildings, and, therefore, the Interpretation Act, s. 3, was excluded because the definitions therein only applies where the context does not otherwise require. In my opinion, the fallacy in the argument is that the Interpretation Act has nothing to do with this case. The order appealed against was made under s. 17 (1) (b) of the Agriculture Act, 1947, which provides:

"Where a supervision order is in force in relation to the farming of an agricultural unit, and the Minister is satisfied that the farming thereof does not while the order is in force show satisfactory improvement, then subject to the provisions of this section . . . (b) where in the case of any land comprised in the unit the occupier is the owner thereof, the Minister shall have power by order to direct that as from such date as aforesaid the occupier shall give up his occupation of that land, or any part thereof specified in the order, and let it to a tenant approved by the Minister."

It is agreed that there was a supervision order in force in relation to the farming of this agricultural unit. I do not look at the Interpretation Act, 1889, s. 3, because by the definition section of the Act of 1947 (s. 109 (2)):

"In this Act the expression 'agricultural unit' means land which is occupied as a unit for agricultural purposes, including—(a) any dwelling-house or other building occupied by the same person for the purpose of farming the land . . ."

Therefore, if the Minister makes an order in respect of land comprised in an agricultural unit and that land includes a dwelling-house or other building, those buildings fall within the scope of the order, though it is open to the Minister, if he chooses to do so, under the latter part of s. 17 (1) (b), to exclude

* By the Interpretation Act, 1889, s. 3: "In every Act passed after the year 1850, whether before or after the commencement of this Act, the following expressions shall, unless the contrary intention appears, have the meanings hereby respectively assigned to them; namely . . . The expression 'land' shall include messuages, tenements, and hereditaments, houses, and buildings of any tenure . . ."

the house or other building from the order as being a "part" of the land. To give effect to the argument of counsel for the appellant would produce the extraordinary position that the Minister could order the appellant to give up the farm, but not the buildings, although no farmer could carry on the farm without the buildings. But the argument fails, not because of that possible inconvenience, but because the definition in s. 109 (2) (a) shows what "land" includes.

FINNEMORE, J.: I agree.

McNAIR, J.: I agree.

Appeal dismissed.

Solicitors: *Robbins, Olivey & Lake*, agents for *Forrester & Forrester*, Chippenham (for the appellant); *Solicitor, Ministry of Agriculture and Fisheries* (for the respondent).

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., FINNEMORE AND McNAIR, JJ.)

October 24, 1952

MOONEY v. MOONEY

Bastardy—"Single woman"—Bastard child born to married woman—Divorce and subsequent marriage with father—Woman now living apart from present husband—Bastardy summons by woman against present husband—Bastardy Laws Amendment Act, 1872 (35 & 36 Vict., c. 65), s. 3.

On Apr. 21, 1948, a woman, who was then married to F.M., gave birth to a bastard child of which W.M. was the father. The woman subsequently obtained a decree of divorce from F.M., and on Aug. 21, 1948, she married W.M., with whom she lived till July 25, 1951, when she left him with the intention of not returning. On Nov. 7, 1951, a summons by her against W.M. alleging desertion was dismissed. On May 14, 1952, she preferred a bastardy summons against her husband, W.M., which was dismissed by the justices on the ground that she was not a "single woman" within the meaning of s. 3 of the Bastardy Laws Amendment Act, 1872.

HELD: that, although for some purposes a married woman living apart from her husband may be treated as a "single woman" within the meaning of s. 3 of the Act of 1872 quoad a third party, a wife living apart from her husband cannot be a "single woman" quoad her own husband, particularly when she has refused to return to him. The decision of the justices was, therefore, right.

CASE STATED by Lancashire justices.

At a court of summary jurisdiction sitting at Islington, Liverpool, on May 14, 1952, the appellant, Marguerite Mooney, preferred a complaint under the Bastardy Laws Amendment Act, 1872, s. 3, against her husband, the respondent, William Mooney, alleging that he was the father of a bastard child born to her on Apr. 21, 1948.

It was proved or admitted that the child was born on Apr. 21, 1948, at which time the appellant was the wife of one Frederick Molyneux. The appellant had lived apart from the said Molyneux since 1940 and had not seen him since that year. On May 11, 1948, she obtained a decree nisi of divorce on the ground of cruelty against the said Molyneux, the decree being made absolute

on June 24, 1948. The wife had been associating with the respondent for about a year preceding the birth of the child and had intercourse with him regularly from about April, 1947. The respondent registered the birth of the child, and was described as the father in the birth certificate. On Aug. 21, 1948, the appellant married the respondent and from then until July, 1951, he maintained her and the child. On July 25, 1951, the appellant left the respondent in circumstances which precluded her from obtaining a maintenance order on the ground of desertion, and she had no intention of returning to the respondent. The justices held that the respondent was the father of the child, but they dismissed the summons on the ground that the appellant was not a "single woman" within the meaning of s. 3 of the Bastardy Laws Amendment Act, 1872. She now appealed.

Homfray-Davies for the appellant.
The respondent did not appear.

LORD GODDARD, C.J., stated the facts and continued: Counsel for the appellant has cited all the relevant authorities which are summarised in *ATKINSON, J.*'s judgment in *Jones v. Evans* (1), and he has contended that on the authority of those cases the appellant should be regarded as a "single woman". Parliament might have provided that any woman who was delivered of a bastard child could maintain affiliation proceedings against the putative father, but it has only given that right to a single woman. The courts have construed the words "single woman" to mean a woman whose husband has left her or been absent from her at the time of conception either against her will or because he has been taken from her, as in the case of a soldier or a sailor, or, as in one case, a man who was sentenced to transportation, or, I suppose, a man who was sentenced to a long term of imprisonment, although it is not necessary to decide it. In *Taylor v. Parry* (2) this court decided that for the purpose of considering whether a married woman can be considered as a single woman for the purpose of the Bastardy Laws Amendment Act, 1872, s. 3, the law has not been altered by the National Assistance Act, 1948, which has put the obligation on a man to support his own children and on a woman to support her own children, so that a man is no longer under an obligation to support his wife's illegitimate children.

It is said in the present case that, as the appellant is not living with her husband, she falls within the category of "single woman" on account of a long line of authorities dating from 1807. In my opinion, that is not so. No case has ever yet gone the length of deciding that a married woman can be regarded as a single woman quoad her own husband. What has been decided is that a married woman who is not living with her husband, who is serving abroad or has deserted her, can, quoad a third party, be considered as a single woman. In a way that is an anomaly, but it was introduced because it was thought that that would really do justice and be consonant with the spirit of the Bastardy Laws. On the other hand, it would be asking the court to take an enormous step forward to hold that when a married woman summons her husband she can be heard to say that she is a single woman. Still more would it be anomalous when the fact that she is not living with her husband is not his fault, but her fault, he being willing to have her back and support her and her child, and she refuses. It seems to me impossible to bring this case within the line of authorities which for certain purposes have allowed a married woman for the purposes of these

(1) 108 J.P. 170; [1945] 1 All E.R. 19; [1944] K.B. 582.

(2) 115 J.P. 119; [1951] 1 All E.R. 355; [1951] 2 K.B. 442.

Acts to be considered a single woman, and, for these reasons, I think the justices came to a right decision.

FINNEMORE, J.: I agree.

McNAIR, J.: I agree.

Appeal dismissed.

Solicitors: Dubovie, Freeman & Co., agents for A. D. Abrahamson, Liverpool (for the appellant).

T.R.F.B.

COURT OF APPEAL

(SIR RAYMOND EVERSLED, M.R., DENNING AND ROMER, L.JJ.)

Oct 16, 17, Nov. 3, 1952

BIRCH v. WIGAN CORPORATION

Housing—Closing order—"Part of a building"—Terrace house unfit for human habitation—Demolition undesirable as likely to render adjoining houses unfit—Power to make closing order—Housing Act, 1936 (26 Geo. 5 and 1 Edw. 8, c. 51), s. 11 (4), s. 12 (1).

Three dwelling-houses in a block of six terraced houses became unfit for human habitation and were not capable at a reasonable expense of being rendered fit. They could not, however, be demolished without making the remaining three houses uninhabitable. Having regard to the shortage of housing accommodation, the local authority refrained from making an order for the demolition of the three unfit houses, under the Housing Act, 1936, s. 11 (4), but purported to make a closing order relating to them under s. 12 (1). The owner claimed to have the order quashed.

HELD (DENNING, L.J., dissentiente): each of the three houses in question was a "house" within s. 11 (1) and (4), and the local authority were bound to make an order for their demolition under s. 11 (4); the authority had no option to proceed under s. 12 (1), which on its true construction related to part of a building and not to a house, the two sections being mutually exclusive; and, therefore, the order made by the local authority was ultra vires.

APPEAL by Wigan Corporation from an order of His Honour JUDGE BROWN sitting at the Wigan County Court, dated July 4, 1952, allowing an appeal by the owner against an order made by the corporation on Apr. 9, 1952, under the Housing Act, 1936, s. 12, for the closing of the dwelling-houses Nos. 241, 247 and 249, Wigan Lane, Wigan.

Rigg for the corporation.

W. D. T. Hodgson for the owner.

Cur. adv. vult.

Nov. 3. SIR RAYMOND EVERSLED, M.R.: In my judgment, the appeal in this matter should be dismissed for the reasons stated in the judgment which ROMER, L.J., will deliver, which I have had the advantage of seeing, and to which I feel I can usefully add nothing.

DENNING, L.J., read the following judgment. In a street in Wigan there is a block of six houses built about two hundred years ago. Each house in the block is separated from the next one by a dividing wall or partition. All six are owned by the same owner, Mrs. Birch. Three of them are unfit for human

habitation and cannot be made fit by any reasonable expense. The other three are still fit to live in. Two of the unfit houses are at one end of the block. The one other unfit house is in between two fit ones. The question is whether the three unfit houses should be demolished and pulled down, or whether they should only be closed and remain empty. The difficulty about demolishing the bad three is that it cannot be done without making the good three uninhabitable. Each house depends on the next for support. Even if the good three were shored up, their stability would be so impaired that they could not safely be occupied. That is an admitted fact.

In this situation the Wigan Corporation say that the three unfit houses should not be demolished, but should only be closed and remain empty. They say that, by so doing, the three good houses will provide living quarters for three families which is very desirable in view of the housing shortage. So they have made an order, not to demolish, but only to close the three unfit houses. On the other hand, Mrs. Birch, the owner of the six houses, says that all six should be demolished. She says that none of them is fit for human habitation and she would welcome a demolition order for the whole block, so that she could get the tenants out and build a new block altogether. Unless a demolition order is made, the statutory restrictions prevent her from evicting the tenants. I think there is much to be said for Mrs. Birch's point of view. The closing of three of the houses can at best be only a temporary expedient. Once closed, they will rapidly fall into ruin, their bad condition will affect the others, and it cannot be long before the whole block will have to be demolished. So why not demolish them all now? This is, however, a question for the corporation, not for us. It depends very much on the housing situation in Wigan. The corporation are the people to decide it, not the courts. If the corporation do not choose to make a demolition order for all six houses, this court cannot compel them.

The owner now counters with a shrewd legal blow. She contends that the corporation have no power to make a closing order for the three bad houses. The judge has upheld this contention, and has quashed the closing order. He does not suggest that the corporation must make a demolition order for all six, but he does suggest—and this is what I wish to emphasise—that the corporation must make a demolition order for the three bad houses. According to the judge's reasoning, once the corporation are satisfied (as they are here) that three of the houses are fit and three unfit, there is only one course open to the corporation. They must make a demolition order for the three unfit houses. They have no alternative. The statute, he says, is imperative on the point. The three unfit houses must be demolished, even though it makes the other three unsafe and uninhabitable.

I cannot believe that Parliament intended to enact anything so absurd, and I do not think they have. The question depends on the true interpretation of the Housing Act, 1936, s. 11 and s. 12. Section 11 provides that, in the case of a "house" which is unfit, the corporation must make a demolition order. Section 12 provides that, in the case of "part of a building" which is unfit, they must make a closing order. Into which category do these three unfit houses fall? Is each of them a "house" within s. 11, or is it a "part of a building" within s. 12? At first sight one might be tempted to say that each house was both a "house" and also "part of a building", but the wording of the sections precludes such a solution. The sections are mutually exclusive. These three houses must be put in one category or the other. Each of them is either a "house" or a "part of a building". It cannot be both. The solution of the problem is to be found, I think, by supposing that the six houses were all in different ownership,

as, for instance, if each occupier owned his own house. If an order is made for the demolition of the three unfit houses, what is to happen to the owners of the three fit ones? They are clearly entitled at law to support from the neighbouring houses: see *Richards v. Ross* (1). Can it be supposed that Parliament intended to take away their right of support without any protection for their houses and without any compensation for the damage done to them? Yet that is what it means if the judge is right. The Act contains no provision for the protection of the adjacent houses at all. It does not say that anyone is to do any shoring up, even if shoring up would be of any avail, or to treat the dividing wall or partition so as to make it weatherproof. It goes not give the owners of the good houses any remedy if the demolition renders their houses damp or unsafe, and I do not see that they would have any remedy—not, at any rate, if the demolition were carried out with reasonable care. The statutory authority to demolish would be a bar to any action by the neighbouring owners. The absence of any provision for their protection leads me to the conclusion that Parliament did not contemplate that one house out of a block should be demolished any more than one flat out of a block of flats should be demolished.

In this situation there is a simple solution which commends itself to me. It is this: When several houses are in one block, separated from one another only by party walls—so that one cannot be pulled down without taking away the support of the other—they can properly be said to be part and parcel of one building. They then come within s. 12 and not within s. 11. Each house in the block is "part of a building" within s. 12. It is not a "house" within s. 11. If some of the houses in the block are unfit and others are fit, the only proper order is a closing order against the unfit ones, not a demolition order. If all of the houses in the block are unfit, they still do not come within s. 11. The proper procedure then is for them to be declared a clearance area within s. 25 and demolished under s. 26. That is the procedure which was, in my own experience, often adopted before the war, and I think it is the right procedure. This interpretation is supported by s. 18 of the Act, which contemplates that a closing order can be made in respect of a house, and also by *Hedley v. Webb* (2), where it was held that a pair of semi-detached houses constituted "one building only", whence it is right to say that each of them was part of a building.

The argument to the contrary, as I understand it, is this: According to the ordinary meaning of words, a house in a block is a "house" and not "part of a building". Even if this leads to absurdities, or even to injustice, so be it. It is the fault of Parliament. The courts wash their hands of it. I do not think we should approach an Act of Parliament in such a way. We should not thwart the intention of Parliament by holding them to the letter of what they have said. When there is a fair choice between a literal interpretation and a reasonable one—and there usually is—we should always choose the reasonable one. Such is, I believe, the true principle, and I do not find anything in *Mayor & St. Mellons Rural District Council v. Newport Corpn.* (3), to throw doubt on it. I am, therefore, of opinion that the Wigan Corporation were entitled to make a closing order for the three unfit houses, and I would allow the appeal.

ROMER, L.J., read the following judgment. The three houses in question, Nos. 241, 247 and 249, Wigan Lane, Wigan, form part of a row or terrace of six houses, the other three being numbered 239, 243 and 245 respectively. Mrs. Birch is the owner of the whole of this terrace. It is not disputed that the

(1) (1853), 18 J.P. 56; 9 Exch. 218.

(2) 65 J.P. 425; [1901] 2 Ch. 126.

(3) 115 J.P. 613; [1951] 2 All E.R. 839; [1952] A.C. 189.

houses in respect of which the corporation purported to make the closing order are unfit for human habitation and incapable of being rendered fit at reasonable expense, and, indeed, in the view of the owner, the whole row could properly be made the subject of a demolition order under s. 11 of the Act of 1936. The corporation, however, think that the three houses which were unaffected by their order are reasonably fit to be lived in, and, having regard to the shortage of housing accommodation, they are not prepared to make an order for the demolition of the whole of the property. It appears to have been agreed that, if the three houses to which the closing order related were demolished, the other three would collapse because of the resulting withdrawal of lateral support, and it is for this reason that the corporation do not wish to make an order for a partial demolition. No oral evidence was called before the learned judge. He found that each of the six houses is (subject to the walls other than the gables being party walls) a self-contained unit in the sense that there is no internal means of communication between them, and this finding was not challenged in argument before us. The judge said further that he understood that the six houses constituted one block and that it had been suggested they were about two hundred years old. He assumed that they must all have been built at the same time and presumably as part of one operation, but there was no finding as to this. We were given to understand that the dwellings are of a small and somewhat humble character.

The question whether or not the corporation had authority to make a closing order in respect of Nos. 241, 247 and 249, Wigan Lane, depends on the true interpretation and effect of the Housing Act, 1936, s. 11 and s. 12, as amended by the Housing Act, 1949. So far as material, they provide as follows:

- " 11. (1) Where a local authority, upon consideration of an official representation, or a report from any of their officers, or other information in their possession, are satisfied that any house is unfit for human habitation and is not capable at a reasonable expense of being rendered so fit, they shall serve upon the person having control of the house, upon any other person who is an owner thereof, and, so far as it is reasonably practicable to ascertain such persons, upon every mortgagee thereof, notice of the time (being some time not less than twenty-one days after the service of the notice) and place at which the condition of the house and any offer with respect to the carrying out of works, or the future user of the house, which he may wish to submit will be considered by them, and every person upon whom such a notice is served shall be entitled to be heard when the matter is so taken into consideration. (2) A person upon whom notice is served under the foregoing sub-section shall, if he intends to submit an offer with respect to the carrying out of works, within twenty-one days from the date of the service of the notice upon him, serve upon the authority notice in writing of his intention to make such an offer and shall, within such reasonable period as the authority may allow, submit to them a list of the works which he offers to carry out. (3) The authority may if, after consultation with any owner or mortgagee, they think fit so to do, accept an undertaking from him, either that he will within a specified period carry out such works as will in the opinion of the authority render the house fit for human habitation, or that it shall not be used for human habitation until the authority, on being satisfied that it has been rendered fit for that purpose, cancel the undertaking. (4) If no such undertaking as is mentioned in the last foregoing sub-section is accepted by the authority, or if, in a case where they have accepted such an undertaking, any work to which the undertaking relates is not carried out within

the specified period, or the house is at any time used in contravention of the terms of the undertaking, the authority shall forthwith make a demolition order requiring that the house shall be vacated within a period to be specified in the order, not being less than twenty-eight days from the date on which the order becomes operative . . . "

Section 12 provides:

" (1) A local authority may under this Part of this Act take the like proceedings in relation to any part of a building which is used, or is suitable for use, as a dwelling or in relation to any underground room which is for the purposes of this section to be deemed to be unfit for human habitation, as they are empowered to take in relation to a house, subject, however, to this qualification that, in circumstances in which, in the case of a house, they would have made a demolition order, they shall make a closing order prohibiting the use of the part of the building or of the room, as the case may be, for any purpose other than a purpose approved by the local authority, but—
 (a) the approval of the authority shall not be unreasonably withheld; and
 (b) the authority shall determine the closing order on being satisfied that the part of the building or the room to which it relates has been rendered fit for human habitation. (2) A room the surface of the floor of which is more than three feet below the surface of the part of the street adjoining or nearest to the room, or more than three feet below the surface of any ground within nine feet of the room, shall for the purposes of this section be deemed to be unfit for human habitation . . . "

As stated by the judge, there are no definitions to be found in the legislation which are of any assistance in the solution of the present problem and, indeed, I think that none of the other provisions to which our attention was directed has any bearing on it save, perhaps, s. 18 of the Act of 1936 which (so far as relevant) enacts:

" A local authority may pay to any person displaced from a house, to which a demolition order made under this Part of this Act, or a closing order, applies, such reasonable allowance as they think fit towards his expenses in removing, and to any person carrying on any trade or business in any such house they may pay also such reasonable allowance as they think fit towards the loss which, in their opinion, he will sustain by reason of the disturbance of his trade or business consequent on his having to quit the house . . . "

In my judgment, the order of the learned judge was right and I agree with the reasons on which it was founded. The respective contentions on each side may be shortly summarised as follows. For the corporation it was argued, as I understood it, that a demolition order ought only to be made under s. 11 of the Act in relation to a house which does not form part of an entire block or building; that each house in a terrace (such as the one in the present case) forms part of one building, viz., the terrace itself; and that in regard to houses of that kind a local authority has the option of making a closing order under s. 12 instead of a demolition order under s. 11. On the other hand, it was argued on behalf of the owner that s. 11 and s. 12 are mandatory and are mutually exclusive, and that the former section deals with every building which constitutes a house and the latter section is confined in its operation to parts of buildings other than houses.

There are four considerations which, at least in combination, seem to me to support very strongly the decision at which the learned judge arrived. First, it is quite clear that whether or not the three uninhabitable dwellings in question fall within s. 12 of the Act, they come fair and square within the provisions of s. 11. They are "houses" to which the conditions specified in s. 11 admittedly

attach. What, then, is the result? It is, on the clear language of s. 11, that the local authority became bound—for the section is compelling in this regard—to set in motion the prescribed machinery for their demolition. In other words, s. 11 on the face of it provides a comprehensive and compulsory code for the position which did in fact arise. Secondly, if, notwithstanding the precise applicability to the matter of s. 11, the legislature intended to give the corporation the alternative of making a closing order under s. 12, then an option is impliedly introduced which is inconsistent with the obligation imposed in unequivocal terms by s. 11. The fact that no such words as “subject to the provisions of s. 12” are to be found in s. 11 suggests strongly to my mind that no such option was intended. Thirdly, just as the provisions of s. 11 are mandatory when a position arises for their application, so also are those of s. 12 in cases which fall within their scope. On the corporation’s contention, the three houses under discussion fall within both of the sections and, in the absence of such an option as that which I have mentioned (and for which, in my judgment, there is no sufficient warrant) a local authority would be bound to make both a demolition order and a closing order in relation to them—a conception which tends with some force to show that s. 11 and s. 12 are mutually exclusive. Fourthly, inasmuch as the position of “houses” is fully and completely dealt with by s. 11, the natural expectation surely is that the object of s. 12 is to deal with something else. To my mind, that expectation is sufficiently fulfilled by the fact that in s. 12 there is a most significant change in language. The word “house” disappears from the scene and a different word, the word “building”, is used in its place—“any part of a building which is used, or is suitable for use, as a dwelling”. This in itself, I should have thought, sufficiently confirms the expectation that s. 12 is dealing with something different from that with which s. 11 has already dealt. If, however, any doubt on the matter still remained, it is, as I think, removed by the subsequent mention, for referential purposes only, of houses. The power conferred by s. 11 is to order demolition, and it is conferred in relation to “houses”. Section 12 expressly enacts that in regard to a “part of a building” or “any underground room” which is unfit for habitation the local authority may take the like proceedings as they are empowered to take “in relation to a house”, but subject to the qualification that where “in the case of a house” they would have made a demolition order, they shall make a closing order instead. Whatever else, therefore, “any part of a building” may include, these references, in my judgment, establish conclusively that it does not include a house.

In view of the above considerations, I am of opinion that any building that is a “house” (as each of those in question before us undoubtedly is) falls exclusively within s. 11 and the local authority is bound to apply to it (if the relevant conditions exist) the provisions of that section. No doubt, for some purposes and in other contexts two “houses” may also constitute one building. *Hedley v. Webb* (1) decided that two semi-detached houses were a single building for the purpose of determining whether there was a sewer within the meaning of the Public Health Act, 1875, s. 4, but the essential dichotomy with which we are concerned was absent from the section considered in that case, and, so far as s. 11 and s. 12 of the Act now in question are concerned, each dwelling is to be treated, not as a part of a building but as a house, a conception which, I venture to suggest, is in conformity with ordinary ideas on the subject.

Some reliance was placed by counsel for the corporation on s. 18 of the Act of 1936, the language of which shows, in his submission, that the legislature

(1) 65 J.P. 425; [1901] 2 Ch. 126.

envisaged the making of a closing order in relation to a house as a whole. It seems to me that this aspect of s. 18 is quite insufficient to disturb the effect of the language in which s. 11 and s. 12 are couched. Moreover, it is to be observed that a closing order does in fact apply to a house, although it only affects a part of it. Apart from the points with which I have already dealt, it was suggested by the corporation that the effect of s. 11 and s. 12 of the Act of 1936 might be that a dwelling in a terrace could be treated as a "house" if it could be demolished without bringing its neighbour to the ground, but as "part of a building" if it could not. This result, I think, can only be reached by taking remarkable liberties with the sections. Apart, however, from that, it would presumably also involve the gradual degradation of a dwelling which was a "house" when it was new to the status merely of a part of a building when it grew old. The precise point of time in its life when this humiliation would occur would in many cases give rise to controversy and uncertainty, and I am quite unable to accept an argument which is unsupported by the language of the sections and which leads to such an extraordinary result. Finally, it was urged that it would lead to the gravest inconvenience if a local authority could not make a closing order in relation to a derelict house the demolition of which would bring about the destruction of adjoining houses which are fit to live in. To what extent this result will follow, I do not know. It is common knowledge that during the recent war even old houses in terraces or rows of rather flimsy dwellings frequently survived the destruction of those which adjoined them, so, possibly the fears which were expressed on this score may be somewhat over-rated. Be that as it may, if s. 11 and s. 12 of the Act, on their true construction, require that a certain meaning and effect should be attributed to them, the fact (if fact it be) that one of the results may be unexpected and inconvenient is a matter for the legislature and not for the courts. For the above reasons, the appeal should, in my opinion, be dismissed.

Appeal dismissed.

Solicitors: *Ruston, Clarke & Ruston*, agents for *Allan Royle*, town clerk, Wigan (for the corporation); *Gregory, Rowcliffe & Co.*, agents for *Hall, Brydon & Co.*, Manchester (for the owner).

F.G.